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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 284

THE UNITED STATES OF AMERICA AND THE INTER-
STATE COMMERCE COMMISSION, APPELLANTS

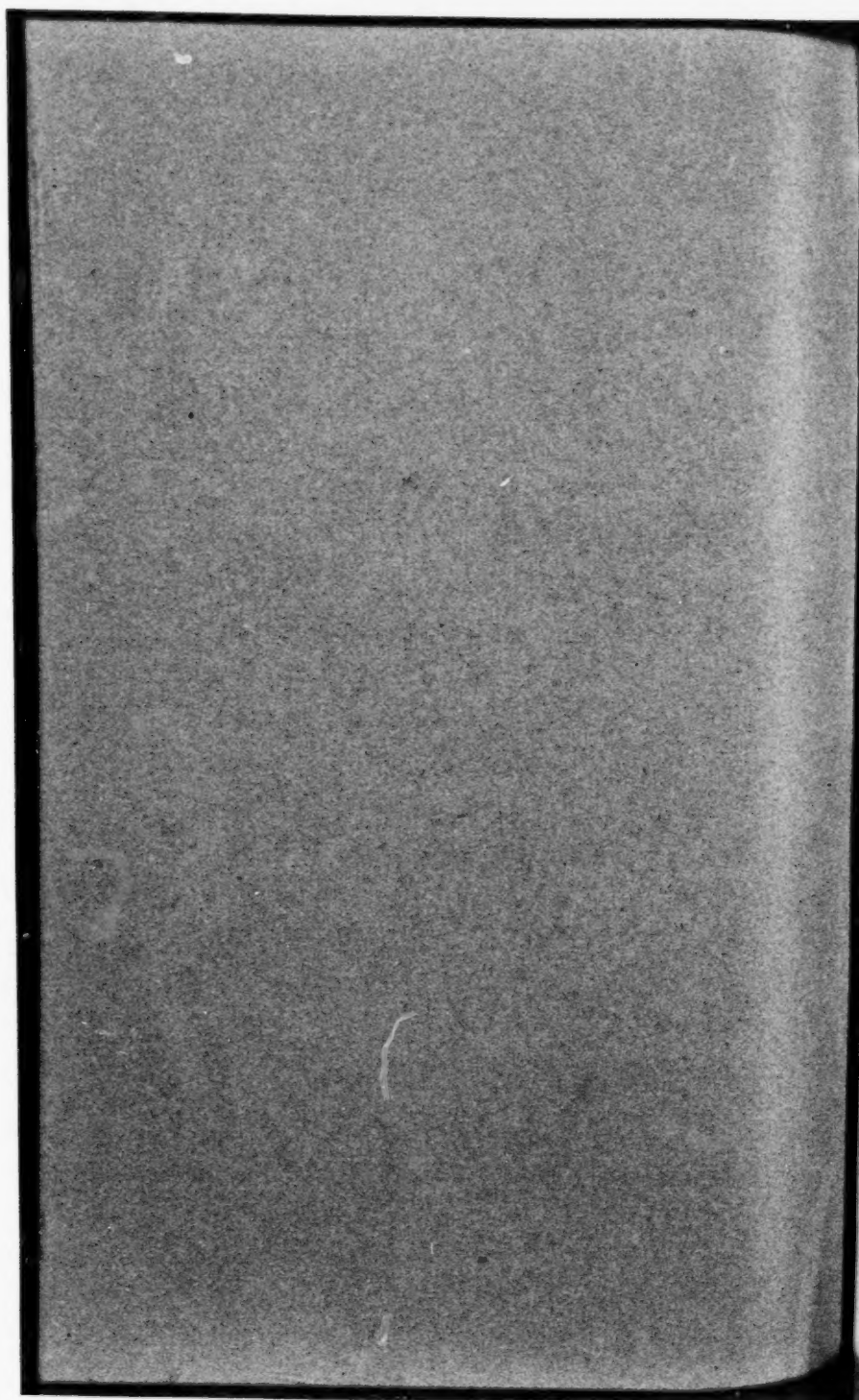
vs.

THE NEW YORK CENTRAL RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF NEW YORK

FILED JANUARY 30, 1927

(31653)



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THE NORTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from District Court of the United States, Northern New York	1	1
Order to show cause	1	1
Petition	3	2
Exhibit A.—Subdivision 13 of section 6 of the Interstate commerce act	28	15
Exhibit B.—Complaint of State of New York and superintendent of public works	30	16
Exhibit C.—Report of Interstate Commerce Commission	36	20
Answer of the United States	84	47
Intervention of Interstate Commerce Commission	90	49
Answer of Interstate Commerce Commission	91	50
Order to transmit certain papers	94	52
Stipulation re statement of evidence	95	52
Proceedings before Interstate Commerce Commission	97	53
Report of commission (copy) [omitted in printing]	97	53
Order of commission in case of State of New York <i>vs.</i> N. Y. C. R. R. Co.	125	53
Statement of evidence	126	54
Appearances of counsel [omitted in printing]	126	54
Colloquy between examiner and counsel	127	55
Testimony of J. W. Grady	128	56
Leroy C. Hulburd	136	60
Colloquy between examiner and counsel	143	62
Testimony of Charles E. Spangenberg	145	64
Frank E. Williamson	160	70
G. Roy Hall	163	71
Robert W. Davis	169	74
Colloquy between examiner and counsel	172	74

Record from District Court of the United States, etc.—Continued.

Proceedings before Interstate Commerce Commission—Con.	Original	Print
Amended and formal complaint (copy) [omitted in printing]-----	173	75
Answer-----	179	75
Intervening petition of Rochester Terminal and Canal Corporation and Interwaterways Line, Inc.-----	183	78
Proceedings before Public Service Commission of New York-----	185	79
Statement of evidence-----	185	79
Appearances of counsel [omitted in printing]-----	185	79
Testimony of Friend P. Williams-----	185	79
William F. Felton-----	192	83
Friend P. Williams (recalled)-----	194	84
Elias H. Anderson-----	195	85
John B. Garman-----	197	86
Patrick H. McKeown-----	199	87
Complainant's Exhibit 9.—Letter from W. J. Mullin to Edward T. Walsh, January 13, 1920-----	200	88
Testimony of James P. Daly-----	201	88
James E. Wilson-----	207	91
Matthew A. Ewen-----	211	94
Edward S. Walsh-----	213	95
Walter R. Galvin-----	215	96
John C. Wertz-----	215	96
Edward S. Walsh (recalled)-----	216	97
Frank E. Williamson-----	223	100
F. W. Burton-----	225	101
B. E. Failing-----	226	102
J. W. Pfau-----	228	103
Daniel W. Dinan-----	235	107
E. H. Croly-----	247	113
Leland Wadsworth-----	256	118
Exhibits Nos. 6-13, inclusive.—Photographs [omitted in printing]-----	260	120
Exhibit No. 1.—Map showing locations of terminals [omitted in printing]-----	268	120
Exhibit No. 2.—Comparative statement of tonnage-----	269	121
Exhibit No. 3.—General circular No. 18, Bureau of Canal Traffic-----	270	124
Exhibit No. 5.—Map showing portion of Erie Canal lands [omitted in printing]-----	273	126
Opinion, Hough, J.-----	274	127
Dissenting opinion, Cooper, J.-----	286	133
Final decree-----	294	137
Docket entries-----	296	138
Petition for appeal-----	297	139
Assignments of error-----	298	139
Order allowing appeal-----	302	142
Praecipe for transcript of record-----	303	143
Citation and service [omitted in printing]-----	305	143
Clerk's certificate [omitted in printing]-----	306	143
Statement of points to be relied upon and designation of parts of record to be printed-----	307	143

1 In United States District Court for the Northern District
of New York

THE NEW YORK CENTRAL RAILROAD COMPANY,
petitioner
against

} In Equity No. 640

THE UNITED STATES OF AMERICA, RESPONDENT

Order to show cause

Whereas, in the above-entitled suit application has been made to the undersigned, a district judge of the United States for the Northern District of New York, for an interlocutory injunction suspending and restraining the enforcement, operation, and execution of and setting aside a certain order made by the Interstate Commerce Commission as of the date of December 9th, 1924, and

Whereas, a verified petition praying for such interlocutory injunction and for a permanent injunction forever enjoining, setting aside, annulling and suspending the enforcement, operation, and execution of said order of the Interstate Commerce Commission as set forth in said petition has been duly filed with the clerk of this court, and

2 Whereas, it has been made to appear from said verified petition that the petitioner may be entitled to an interlocutory injunction suspending and restraining the enforcement, operation, and execution of and setting aside said order of the Interstate Commerce Commission as set forth in said petition, it is

Ordered, that the respondent herein, the United States of America, appear before the undersigned and two other judges, at least one of whom being a United States circuit judge, said judges having been called by the undersigned to his assistance to hear and determine said petition in accordance with the provisions of an act of Congress of October 22, 1913, at the United States court rooms in the post office building, in the city of Albany, New York, on the second day of May, 1925, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, and then and there show cause before said court and judges so convoked or so called together why the interlocutory injunction prayed for in said petition should not issue, and it is further

Ordered, that a copy of this order with the petition attached thereto be served upon the Attorney General of the United States and on the secretary of the Interstate Commerce Commission at least five days before said second day of May, 1925, as by said statute made and provided.

United States District Judge.

Dated at Albany, N. Y., this

day of April, 1925.

[Title omitted.]

Petition filed Apr. 23, 1923

Petition to the Honorable Judge of the District Court of the United States for the Northern District of New York:

The New York Central Railroad Company, a corporation organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois, brings this petition against the United States of America and hereby sues to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission, a commission existing by virtue of an act of Congress of February 4, 1887, entitled, "An act to regulate commerce," and the acts amendatory thereof and supplemental thereto, and thereupon your petitioner complains and says:

I

Since March 1, 1920, your petitioner has been and now is a common carrier engaged in the business of operating steam railroads located in the State of New York and in other States and in the transportation of freight and passengers in interstate commerce, subject to the provisions of the interstate commerce act, insofar as the same are constitutional. For many years prior to December 28, 1917, at which time the President of the United States took possession and assumed control of the railroads of your petitioner, petitioner or its predecessors were engaged in the business of operating aforesaid steam railroads and in the transportation of persons and property in interstate commerce.

II

This suit is brought to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission and is instituted under the provisions of the interstate commerce act and of the act of October 22, 1913, entitled, "An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and thirteen and for other purposes," and also under the general equity jurisdiction of this court.

III

The order of the Interstate Commerce Commission, which it is hereby sought to enjoin, set aside, suspend, and annul, was made upon the petition of the State of New York and of Edward S. Walsh, as then superintendent of public works of the State of New York. The capital of the State of New York, the official residence of the governor thereof, and the seat of the legislature thereof, is

at Albany, New York, where is also the official residence of the superintendent of public works of the State of New York, now Frederick Stuart Greene.

5

IV

Said petition or complaint of the State of New York and of the superintendent of public works of the State of New York was filed with the Interstate Commerce Commission on or about March 22, 1923, and purported to be filed pursuant to the provisions of subdivision 13 of section 6 of the interstate commerce act, as amended. A copy of said subdivision 13 of section 6 of the interstate commerce act is for the convenience of the court attached hereto and marked, "Exhibit A." A copy of the petition or complaint of the State of New York and the superintendent of public works of the State of New York is attached hereto and marked, "Exhibit B."

V

In said petition or complaint it was alleged that the State of New York had expended large sums of money in the construction of barge canals within the State; that the Erie Basin terminal was situated upon Buffalo Harbor, adjacent to Lake Erie, within the city of Buffalo, New York, and consisted of eight acres of land and piers equipped with machinery for the loading and unloading of freight; that the property of your petitioner bounded the eastern part of said terminal lands; that a physical connection had been constructed between tracks of your petitioner and the standard gauge tracks laid down by the State of New York within the terminal premises; that your petitioner had refused to interchange traffic with the terminal; that considerable business warranting such interchange had developed or was developing, and prayed
6 an order of the Interstate Commerce Commission pursuant solely to subdivision 13 of section 6 of the interstate commerce act requiring your petitioner to provide transportation service between the Erie Basin barge canal terminal in the city of Buffalo and shippers located on your petitioner's tracks in the city of Buffalo and at any other points within the State of New York and shippers located at other points in the State of New York on the tracks of any other railroad company with which your petitioner could interchange traffic, and requiring that such transportation service should include the furnishing of the necessary rolling stock by your petitioner for the handling of all traffic moving to or from the Erie Basin barge canal terminal and from or to all shippers located on its tracks in the city of Buffalo, or any of the points on its tracks within the State of New York; the operation by your petitioner upon the railroad tracks within the Erie Basin barge canal terminal, with its own motive power and servants, of rolling stock going to and coming from said terminal and the spotting, placing, and removal of the rolling stock thereon; that your petitioner es-

tablish proper rates for such service; and that any other carrier subject to the jurisdiction of the commission whose presence might later appear to be necessary be joined as a party.

VI

Your petitioner duly filed its answer to said petition or complaint in which it alleged, among other things, as follows:

7 "9. Further answering the complaint and as a separate defense thereto, defedant alleges that the State of New York is not a common carrier by rail or by water and has no status under the interstate commerce act to maintain this proceeding and that this commission has no jurisdiction to entertain a complaint preferred by a person, individual or corporate, having the status of this complainant.

"10. Further answering the complaint and as a separate defense thereto, defendant alleges that no carrier by water is a party to this proceeding and that the exercise of the jurisdiction conferred upon this commission by subdivision 13 of section 6 of the interstate commerce act is conditional upon the presence in this proceeding of each and every of the carriers by water required to participate in the payment of the expense of operating water and rail terminals, switching charges, joint rates, the division of rates and other charges incident to the transfer of freight or passengers at such rail-water terminals, including the Erie Basin barge canal terminal mentioned in complaint.

"11. Further answering the complaint, and as a separate defense thereto, defendant alleges that the barge canal terminal described in the complaint is one of a chain of terminals which are used or intended to be used in connection with the barge canal itself, extending from Buffalo easterly through the State of New York to the Mohawk River and thence to its confluence with the Hudson River and down the Hudson River to the city of New York, with extensions of the canal system reaching Lake Ontario, the Finger Lakes, and Lake Champlain. The barge canal proper is parallel to and a comparatively short distance from the lines of railroad owned by this defendant extending across the State of New York and down the Hudson River. Barge canal terminals have been constructed, or are under construction, or have been planned with reference to every city and town of any consequence between the termini of the barge canal as above described, and all of such points are directly reached by the lines of railroad owned and operated by this defendant.

"As defendant is informed and believes, the present proceeding would require this defendant to operate not only from its physical connection with the barge canal terminal at Erie Basin, Buffalo, N. Y., but to operate the terminal itself and to switch to and from said terminal to shippers and consignees located in and about the city of Buffalo, or for transfer to other railroads connecting with

the defendant's lines in and about the city of Buffalo. Such movements would be wholly switching movements and would not, unless under very exceptional circumstances, involve even a short haul along the main tracks of this defendant. As defendant is informed and believes, if the complainant here is successful in this proceeding, it is its intention immediately to apply further to this commission to compel this defendant to operate all the other barge canal terminals and perform switching service in connection therewith throughout the length of the barge canal and its water connections from Buffalo to New York. In such operations this defendant will be deprived of any railroad haul of consequence. There would and could be no element of reciprocity in the switching, and defendant, at great loss to itself of traffic which would otherwise move over its rails, will be compelled at unremunerative compensation to join

9 in an effort the purpose of which is to divert traffic from its own rails in order to benefit water carriers not before this commission. Many of the barge canal terminals, as constructed or proposed to be constructed, are situated away from the commercial centers of the towns and cities which such terminals are intended to serve and the railroad operation of such terminals and the performance of switching service would in every instance, as this defendant is informed and believes, be accomplished at great expense to defendant and by a diversion of locomotives, cars, and operating crews from their regular functions, to the detriment of the transportation business conducted by this defendant, and to the prejudice of shippers and consignees served by this defendant.

"The situation of this defendant with reference to the barge canal is unique as regards other rail carriers whose lines lie within the State of New York. Several north and south lines, especially rail carriers transporting coal, intersect the barge canal substantially at right angles and preserve a reasonably long haul for themselves in any interchange of traffic."

VII

Following the filing of said petition or complaint and the answer of your petitioner thereto hearings were had before examiners of the Interstate Commerce Commission. At the first of said hearings on June 15, 1923, your petitioner duly moved the dismissal of the petition on the ground that neither the State of New York nor the superintendent of public works of the State of New York was a common carrier by water, that no common carrier by water was
10 a party to the proceeding, and that therefore the commission was without any jurisdiction under subdivision 13 of section 6 of the interstate commerce act, and that no cause of action before the commission subject to the provisions of subdivision 13 of section 6 of the interstate commerce act was alleged. Thereupon counsel for the State of New York and for the superintendent of public works of the State of New York presented what was stated

to be a petition for intervention on behalf of the Rochester Terminal and Canal Corporation and Inter-Waterways Line, Inc., which were alleged to be corporations organized under the laws of the State of New York and common carriers operating canal boats, tugs, and other equipment upon the barge canal. It was not alleged, however, that said companies were common carriers subject to the interstate commerce act and their representatives, called as witnesses, denied any purpose or intention to render themselves or their companies subject to the provisions of said act. The examiner of the Interstate Commerce Commission permitted said companies not only to intervene but to be made parties complainant notwithstanding the objection of your petitioner to said ruling. Your petitioner duly excepted to the ruling on the ground that it was contrary to the provisions of the interstate commerce act relating to the filing and serving of complaints and to the rules of practice of the Interstate Commerce Commission.

VIII

Thereafter the examiner of the Interstate Commerce Commission filed his proposed report and findings. Briefs and exceptions thereto were filed and argument was had before Division 4
11 of the Interstate Commerce Commission. In its brief and on argument your petitioner duly urged that the petition or complaint of the State of New York and of the superintendent of public works of the State of New York should be dismissed on the grounds, among others, that no common carrier by water subject to the provisions of the interstate commerce act was a party to the proceeding, that the evidence failed to show that there was or would be any interchange of freight between your petitioner and any common carrier by water subject to the provisions of the interstate commerce act, that there was no evidence of record upon which the commission could fix the conditions and terms of operation of said terminal as required by subdivision 13 of section 6 of the interstate commerce act, and that under the circumstances of the case, the commission was without authority to issue the order prayed for under the provisions of said subdivision 13 of section 6.

IX

Notwithstanding the objections and argument of your petitioner the Interstate Commerce Commission on or about January 26, 1925, issued a report containing its findings and conclusions and served upon your petitioner its order dated December 9, 1924, in terms as follows:

12

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of December A. D. 1924

No. 14777

THE STATE OF NEW YORK AND EDWARD S. WALSH, SUPERINTENDENT
OF PUBLIC WORKS OF THE STATE OF NEW YORK

V.

THE NEW YORK CENTRAL RAILROAD COMPANY

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the city of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

It is further ordered, that said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom.

And it is further ordered, that this order shall continue in force and effect until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

A copy of the commission's report and of the dissenting opinion of Mr. Commissioner Hall, concurred in by Mr. Commissioner Potter, are attached hereto as Exhibit "C" and made a part hereof.

X

The aforesaid order of the commission of December 9, 1924, is null and void in that while the proceeding in which it was made was a proceeding brought solely under subdivision 13 of section 6 of the interstate commerce act, and while the aforesaid order of 14 the commission purports to be an exercise by the commission of the authority conferred upon it by said subdivision 13 of section 6, nevertheless, the conditions under which alone the authority conferred upon the commission by subdivision 13 of section 6 may be invoked and under which alone the commission may exercise that authority, were not present.

XI

The commission was without authority under subdivision 13 of section 6 of the interstate commerce act to make its said order of December 9, 1924, and said order is null and void for the reason, among others, that said subdivision 13 of section 6 confers jurisdiction upon the commission only of transportation of property which "may be or is transported from point to point in the United States by rail and water," and of common carriers only in so far as they engage in such transportation, but, nevertheless, the aforesaid order of the commission is not so limited as to require your petitioner to perform the transportation service therein ordered with respect only to freight which may be or is transported by rail and water from point to point in the United States, but purports to require your petitioner to perform the transportation service therein ordered with respect to any and all freight which may be offered for transportation to or from said Erie Basin barge canal terminal or within said Erie Basin barge canal terminal, regardless of whether such freight is to be or has been transported by a common carrier by water to or from said terminal or is for local delivery at said terminal or for switching movement between points within said terminal.

15

XII

The commission was without authority under subdivision 13 of section 6 of the interstate commerce act to make its said order of December 9, 1924, and said order is null and void for the reason, among others, that said subdivision 13 of section 6 confers authority upon the commission only in the event that "property may be or is transported from point to point in the United States by rail and water through the Panama Canal, or otherwise, the transportation being by common carrier or carriers," and confers upon the commission authority only with respect to the transportation of such property, and, nevertheless, the aforesaid order of the commission is supported by no finding made by the commission that property may be or is transported from point to point in the United States by rail

and water by a common carrier or carriers which is or may be interchanged with your petitioner at the Erie Basin barge canal terminal.

XIII

If the report of the commission be construed as containing such a finding, said finding is unsupported by competent evidence and the order of the commission thereon, if enforced, will deprive your petitioner of its property without due process of law in violation of the fifth admendment to the Constitution of the United States.

XIV

The Commission was without authority to make its order
16 of December 9, 1924, pursuant to the provisions of subdivision 13 of section 6 of the interstate commerce act, and the aforesaid order is null and void for the reason, among others, that said subdivision 13 of section 6 confers authority upon the commission in the respects therein enumerated only when there are before the commission and subject to its jurisdiction both a common carrier or common carriers by rail and a common carrier or carriers by water which may or do engage in the transportation of property from point to point in the United States by rail and water, and yet in the proceeding in which the commission issued its aforesaid order of December 9, 1924, there was before it and subject to its jurisdiction no common carrier or carriers by water which might or did engage in such transportation.

XV

If it be concluded that the Rochester Terminal and Canal Corporation and the Inter-Waterways Line, Inc., which, over the objection of your petitioner, were permitted to intervene and become parties to the proceeding before the commission, were common carriers by water within the meaning of said subdivision 13 of section 6 of the interstate commerce act, and were before the commission and subject to its jurisdiction, which your petitioner denies, the aforesaid order of the commission of December 9, 1924, is nevertheless null and void in that it is not so limited as to require your petitioner to perform the transportation service therein ordered with respect only to such freight as may be interchanged with said Rochester Terminal and Canal Corporation and said Inter-Waterways Line,
17 Inc., for transportation from point to point in the United States by rail and water, but purports to require your petitioner to perform the transportation service therein ordered with respect to any and all freight which may be offered for transportation to or from said Erie Basin barge canal terminal, including freight which may not be interchanged with any common carriers by water and freight which may be interchanged thereat with car-

riers by water which were not parties to the proceeding and were not in any way before the commission or subject to its jurisdiction.

XVI

Subdivision 13 of section 6 confers upon the commission no authority to make its aforesaid order of December 9, 1924, and said order is null and void for the following reason, among others:

The purpose of the Congress in enacting said subdivision 13 of section 6 was to promote and facilitate the transportation of freight over through routes by common carriers by rail and water and the commission has authority under said subdivision 13 of section 6 only in furtherance of said purpose. The aforesaid order of the commission of December 9, 1924, does not create a through route or routes for the transportation of property by common carriers by rail and water through or via the Erie Basin barge canal terminal, since it requires no common carrier by water to participate in the interchange of freight at the Erie Basin barge canal terminal or to accept for through transportation freight which may be delivered at said terminal by your petitioner.

XVII

Subdivision 13 of section 6 confers upon the commission no authority to make its aforesaid order of December 9, 1924, and said order is null and void for the following reason, among others:

Said order is not and does not purport to be an order made pursuant to paragraphs (b), (c), or (d) of the aforesaid subdivision 13 of section 6, and purports to be an exercise only of the authority conferred upon the commission by paragraph (a) thereof. Paragraph (a) confers upon the commission in a proper case the authority to establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of a railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. In the present case a connection has already been constructed and the commission is not called upon and does not purport to enter any order under this portion of paragraph (a). The only other authority conferred upon the commission by said paragraph (a) is "to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may either in the construction or the operation of such tracks determine what sums shall be paid to or by either carrier." The aforesaid order of the commission of December 9, 1924, must therefore purport to be an exercise of

the authority conferred upon it by this portion of paragraph (a). Nevertheless, said order is not an order prescribing the terms and conditions under which the connecting tracks or the tracks leading from the line of your petitioner to the docks shall be operated, but is an order simply directing your petitioner to perform such operation without in any manner prescribing the terms and conditions thereof and, therefore, is not within the terms of said paragraph (a). Said order, moreover, is null and void in that the commission has failed to determine what sum shall be paid in connection with said operation by either the rail or the water carrier.

XVIII

If the aforesaid order of the commission shall, nevertheless, be construed as an order determining and prescribing the terms and conditions upon which the connecting tracks shall be operated, it is null and void and constitutes a taking of the property of your petitioner without due process of law in violation of the fifth amendment to the Constitution of the United States for the reason that there is no competent evidence before the commission upon which those terms and conditions could be determined.

XIX

Moreover, there is before the commission no common carrier by water subject to its jurisdiction so that the commission is without the power which paragraph (a) expressly provides that it shall have as a condition to the exercise of its authority, to determine, in the operation of such tracks, what sums shall be paid to or by either the rail carrier or the water carrier. There is, furthermore, no evidence before the commission upon which it could make such a determination, even if there were a common carrier by water before it and subject to its jurisdiction.

XX

The aforesaid order of the commission of December 9, 1924, is null and void in that it purports to require your petitioner not only to make a connection between its line and a track or tracks constructed from the dock to the limits of its right of way and to operate such connection but also to operate and to perform all operating service upon the tracks within the said Erie Basin barge canal terminal, whereas no authority to make such a requirement is conferred upon the commission by subdivision 13 of section 6 of the interstate commerce act.

XXI

The aforesaid order of the commission is null and void for the reason, among others, that it is in substance and effect an order re-

quiring your petitioner to extend its line, in that it requires your petitioner to perform transportation service not only upon its own tracks and upon tracks connecting therewith but to perform a transportation service entirely beyond the property and tracks of your petitioner or tracks connecting therewith and to perform a transportation service over tracks upon property not belonging to your petitioner and beyond the present line of your petitioner's railroad, whereas no power to make such an order is conferred upon the

commission by subdivision 13 of section 6 of the interstate
21 commerce act pursuant to which alone the aforesaid order is made. If subdivision 13 of section 6 be construed as attempting to confer upon the commission authority to make such an order requiring your petitioner to extend its line of railroad and operate over tracks beyond its present line of railroad said subdivision 13 of section 6 is null and void in that it exceeds the limits of regulation and amounts to a taking of the property of your petitioner in violation of the fifth amendment to the Constitution of the United States.

XXII

The aforesaid order of the commission of December 9, 1924, is null and void for the reason, among others, that it purports to require your petitioner not only to operate the connection between its line and the tracks constructed to the docks of the Erie Basin barge canal terminal, but also to provide transportation service between said terminal and points upon the lines of other railroads with which it connects, whereas such other railroads are not parties to this proceeding, and no evidence with respect to them is before the commission upon which the aforesaid order could be made.

XXIII

The commission was without authority to make its aforesaid order of December 9, 1924, and said order is null and void for the reason, among others, that it purports to require your petitioner to furnish cars to shippers located upon the lines of its connections for transportation of freight from points on such connections to the Erie Basin barge canal terminal.

XXIV

The aforesaid order of the commission of December 9, 1924, is null and void in that it expressly purports to require your petitioner to perform said operating service and furnish transportation with respect to intrastate traffic although subdivision 13 of section 6 of the interstate commerce act definitely provides that the authority conferred thereby is with respect only to transportation "not within the limits of a single State."

XXV

The aforesaid order of the commission of December 9, 1924, purports to require your petitioner to enter upon the property of the State of New York and to perform transportation service thereon in violation of the laws of the State of New York and particularly of the provisions of Chapter 746 of the Laws of 1911, which are, in part, as follows:

"Section 1. Definitions. The words 'terminal' and 'terminals' as used in this act shall mean and include lands, docks, dock walls, bulkheads, wharves, piers, slips, basins, harbors, structures, tracks, facilities, and equipment for loading and unloading and temporarily storing freight transported upon the barge canals of this State. The word 'land' wherever used in this act shall be taken to include lands under water as well as uplands.

23 "Section 14. The terminals provided for in this act when constructed shall be and remain the property of the State, and all of said terminals, including docks, locks, dams, bridges, and machinery, shall be operated by it and shall remain under its management and control forever. None of such terminals or any part of any such terminals shall be sold, leased, or otherwise disposed of, nor shall they be neglected or allowed to fall into decay or disuse, but they shall be maintained for, and they shall not for any purpose whatsoever be in any manner or degree diverted from the uses for which they are by this act created.

"Section 15. The canal board is hereby authorized and directed to prescribe rules and regulations for the use of the terminals provided for in this act, and said board may alter such rules and regulations in its discretion from time to time. Such rules and regulations and the provisions of this act for the management, administration and control of terminals shall be enforced by the superintendent of public works. No license, lease, privilege, franchise, easement, grant, or permit shall be given or allowed, solicited or accepted, with or without consideration, or under any circumstances, or for any reason or by any pretense whatsoever, for the use or occupation of any terminal or any part of any terminal by any person, persons, firm, joint-stock association or corporation, for any period of time or for any purpose whatsoever, except for such temporary or restricted use or occupancy or temporary storage as may be necessary or incident to the transfer, receipt or shipment of freight in transit and subject at any and all times to revocation by the canal board.

24 Any use or occupancy of the tracks of any terminal by any railroad car in excess of the time actually necessary to load, unload, or immediately reload any such car, or any use or occupancy of the terminal by goods, merchandise, or freight, or by vehicles bringing freight to or taking freight from any terminal, in excess of that actually necessary to the receipt, shipment, or transfer thereof shall be deemed a misuse of such terminal, and any such car, goods, merchandise, freight, or vehicles, may be summarily

removed from the terminal by the superintendent of public works, or by any officer, agent, or employee acting under him, and no claim for damages shall be enforceable against the State of New York or against said superintendent or any such officer, agent, or employee because of such removal. Freight may be temporarily stored upon any terminal or in the shed or storehouse thereon, or be transferred, received, or shipped at such terminal, and the privilege of such temporary storage or of such transfer, receipt, or shipment, shall be subject to such equitable charges for such use as the canal board shall establish and publish, and the superintendent of public works shall collect such charges and shall pay the same into the state treasury, and he may retain any such freight until such charges are paid."

XXVI

If the aforesaid order of the commission of December 9, 1924, is not enjoined and set aside your petitioner will be required to accept for transportation to and delivery at said Erie Basin barge canal terminal freight consigned to points reached by the lines of your
25 petitioner which otherwise would be transported to said points by your petitioner, and for the transportation of which your petitioner would receive valuable compensation pursuant to its tariffs on file with the Interstate Commerce Commission and the Public Service Commission of the State of New York. In support of the petition of the State of New York, upon which the aforesaid order of December 9, 1924, was made, it was alleged that the amount of such freight which your petitioner would be required to transport to said Erie Basin barge canal terminal was substantial. Therefore, if the aforesaid order of the commission of December 9, 1924, is not enjoined or set aside and your petitioner is compelled to comply therewith and to accept for transportation to said Erie Basin barge canal terminal freight which otherwise your petitioner would transport to destination over its lines and for the transportation of which it would receive a valuable compensation, your petitioner, as it verily believes, will be deprived of substantial revenue to which under the law it is justly entitled, all to the great damage of your petitioner for which it will be without adequate remedy or protection at law.

XXVII

If the aforesaid order of the commission of December 9, 1924, is not enjoined and set aside, your petitioner, if it fails to comply therewith, will be subjected to liability for penalties for violation thereof pursuant to the provisions of the interstate commerce act and will be without adequate remedy or protection at law.

XXVIII

26 In consideration whereof, inasmuch as your petitioner is remediless in the premises and by the strict rules of the common law, and if the enforcement of the said order of the com-

mission of December 9, 1924, is not stayed and enjoined, will suffer irreparable damage, and to the end that it may obtain the relief to which it is entitled, your petitioner prays:

First: A permanent injunction decreeing that said order of the commission of December 9, 1924, be set aside, annulled, suspended, and its enforcement, operation, and execution be forever enjoined.

Second: An interlocutory injunction suspending and restraining the enforcement, operation, and execution of said order of December 9, 1924, in whole or in part and setting aside the same.

Third: Such other and further relief as may be proper in the premises.

CHARLES C. PAULDING,
CLYDE BROWN,
ROBERT E. WHALEN,
PARKER MCCOLLESTER,
Solicitors for Petitioner.

27 [Duly sworn to by George H. Ingalls; jurat omitted in printing.]

28 *Exhibit A to petition*

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this act.

29

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

30

Exhibit B to petition

The Interstate Commerce Commission

Docket No. 14777. Filed March 22, 1923

THE STATE OF NEW YORK AND EDWARD S. WALSH, SUPERINTENDENT
of Public Works of the State of New York, complainants
against

THE NEW YORK CENTRAL RAILROAD COMPANY, DEFENDANT

Formal Complaint for Failure to Render Service under Sections Six,
Subdivision Thirteen, of the Interstate Commerce Act.

THE STATE OF NEW YORK,
By EDWARD S. WALSH,
Superintendent of Public Works.

Office and post office address, The Capitol, Albany, N. Y.

CARL SHERMAN,
Attorney-General of New York, Attorney for Complainants.
Office and post office address, The Capitol, Albany, N. Y.

EDWARD G. GRIFFIN,
Deputy Attorney General.

31 Before the Interstate Commerce Commission

THE STATE OF NEW YORK AND EDWARD S. WALSH, SUPERINTENDENT
of Public Works of the State of New York, complainants

against

THE NEW YORK CENTRAL RAILROAD COMPANY, DEFENDANT

Complaint for failure to render service under section 6, subdivision
13, of the interstate commerce act

The complainants above named, for their complaint against the defendant herein, allege as follows:

1. That the complainant, the State of New York, is one of the States of the United States, and the complainant, Edward S. Walsh, is its superintendent of public works, duly qualified and acting as such and having general control of the operation and management of the canals of the State.

2. That the complainant, the State of New York, is one of the States is a New York corporation, owning and operating a railroad partly within the State of New York and under the jurisdiction of this commission in the matter complained of.

3. That your complainant, the State of New York, has expended about \$150,000,000 in the construction of its barge canals running from Albany to Tonawanda, and from Whitehall to

32 Waterford, and from Syracuse to Oswego, and from Geneva to Montezuma, wholly within the State of New York and connecting with the Great Lakes, Hudson River, Lake Champlain, and the Finger Lakes. It has also expended about \$23,000,000 in the construction of fifty-seven canal terminals, situated at different points within the State.

4. The Erie Basin terminal is situated upon the Buffalo Harbor adjacent to Lake Erie, within the city of Buffalo, New York. It consists of about eight acres of land and two covered piers, five hundred and four hundred feet long, respectively, with necessary electrically operated machinery for loading and unloading lake, river, and canal craft and also trains and trucks coming to the piers. The defendant, The New York Central Railroad, bounds the eastern part of the terminal lands, and a physical connection between the standard-gage tracks laid by the State within the terminal premises, running down to and around the piers, has been made with the railroad tracks of the defendant wholly outside the terminal. The whole of the terminal has been completed at a cost of about \$2,300,000 and has been ready for operation since the spring of 1920.

5. That the defendant, The New York Central Railroad, reaches industries in and around the city of Buffalo, in the State of New

York, and actually interchanges traffic with all railroads serving the region and under the jurisdiction of this commission.

6. That the only method of interchanging traffic between the aforesaid terminal and barge canal with said railroads and industries is over the tracks of the defendant. The New York
33 Central Railroad Company, by means of the physical connection between defendant's tracks and the tracks within complainants' terminal.

7. That said physical connection and tracks within the terminal are suitable, safe, and proper for their purpose, but the defendant in the face of repeated demands has always unreasonably and unlawfully refused, now refuses, and threatens to continue to refuse to interchange any traffic with the terminal upon behalf of itself or any other common carriers within the jurisdiction of this commission.

8. That a considerable business warranting such interchange has developed and is developing, justifying findings of public convenience and necessity.

Amended paragraph 8a. That the character of the traffic attempting to move, but prevented by the defendant, and moving through said barge canal terminal generally from east to west and from west to east is largely interstate, although there is a considerable and important intrastate traffic so attempting to move, but prevented, and moving through the terminal.

9. That the Public Service Commission of the State of New York heretofore, upon petition of the complainant, the superintendent of public works, granted the very same relief against this defendant, as regards service, hereinafter prayed for, but said State commission was not asked to make and made no order as to rates as is hereinafter prayed for. Said order was made in June, 1920, a rehearing was denied, and certiorari was brought by the defendant in the State
34 courts. The Appellate Division, Supreme Court, Third Department, held in such certiorari proceeding entitled *People ex rel. The New York Central Railroad Company v. Public Service Commission*, 198 App. Div. 436, that the State commission was without jurisdiction to grant the said relief hereinafter prayed for, since the power is given by law to the Interstate Commerce Commission. The order was affirmed by the Court of Appeals, 236 N. Y. 606. Certiorari was denied by the United States Supreme Court to review the action of the State courts in March, 1922 (258 U. S. 621).

Wherefore, your complainants pray, pursuant to § 6, subdivision 13 of the interstate commerce act, as amended, that this commission shall order:

1. That the New York Central Railroad Company provide a transportation service between the Erie Basin barge canal public terminal in the city of Buffalo, and shippers located on its tracks in the city of Buffalo, N. Y., between the Erie Basin barge canal public terminal

in the city of Buffalo and shippers located on its tracks at any other point within the State of New York, and between the Erie Basin barge canal public terminal in the city of Buffalo and shippers located at any other point in the State of New York, on the tracks of any other railroad company, with which the New York Central Railroad Company can interchange traffic.

2. That such transportation service shall include the furnishing of necessary rolling stock by the New York Central Railroad Company, for all traffic moving from the Erie Basin barge canal public terminal and from all shippers located on its tracks in the city of Buffalo or any other point on its tracks within the State of New

York to the Erie Basin barge canal public terminal, the
35 operation by the New York Central Railroad Company upon the railroad tracks within such Erie Basin barge canal public terminal by such railroad's own motive power and servants, all rolling stock going to or coming from said Erie Basin barge canal public terminal; and the spotting, placing, and removing of rolling stock therein.

3. That the defendant, pursuant to such statute, shall establish proper rates for such service.

4. That any other carrier subject to the jurisdiction of this commission and whose presence may later appear to be necessary for a proper disposition of this complaint be joined as a party.

5. Complainants further pray that this complaint be decided upon the same printed record presented to the United States Supreme Court in the application for certiorari, entitled, "No. 773, Public Service Commission of the State of New York v. New York Central Railroad Company, et al. (258 U. S. 621)," denied, to be supplemented, if necessary by evidence taken either in Albany or Buffalo, New York.

Dated: March 1, 1923.

THE STATE OF NEW YORK,

By EDWARD S. WALSH,

Superintendent of Public Works,

Office and post office address, the Capitol, Albany, N. Y.

CARL SHERMAN,

Attorney General of New York, Attorney for Complainants,

Office and post-office address, the Capitol, Albany, N. Y.

EDWARD G. GRIFFIN,

Deputy Attorney General.

Exhibit C to petition

Interstate Commerce Commission

No. 14777

STATE OF NEW YORK ET AL.

v.

NEW YORK CENTRAL RAILROAD COMPANY

Submitted May 29, 1924. Decided December 9, 1924

Upon complaint, ordered that the defendant New York Central Railroad Company furnish a transportation service between the Erie Basin barge-canal public terminal, Buffalo, N. Y., and points and shippers located on its line and on lines of its connections, and perform upon the terminal tracks the operating service necessary to an interchange of traffic with barge-canal lines at the terminal, all with defendant's own motive power and other equipment, the services to embrace all traffic, interstate and intrastate, that may be transported to or from the terminal over defendant's line

Carl Sherman, attorney general, and Edward Griffin, deputy attorney general, of State of New York, for complainants.

Carl Sherman, attorney general, and W. J. Wetherbee, deputy attorney general, for Rochester Terminal & Canal Corporation and Interwaterways Line, Incorporated, interveners.

Maurice C. Spratt and Parker McCollester for defendant.

REPORT OF THE COMMISSION

McCHORD, commissioner.—Exceptions to the report proposed by the examiner have been filed by complainants, State of New York and its superintendent of public works, and by the sole defendant, New York Central Railroad Company, and those parties have been heard in oral argument. All points hereinafter mentioned are in the State of New York.

The complaint, filed March 22, 1923, is in substance as follows: That the State has expended about \$150,000,000 in the construction of a barge-canal system, extending from Albany to Tonawanda, from Whitehall to Waterford, from Syracuse to Oswego, and from Geneva to Montezuma, wholly within the State and connecting with the Great Lakes, Hudson River, Lake Champlain, and the so-called Finger Lakes (in the western central portion of the State); that it has also expended about \$23,000,000 in the construction of 57 canal terminals, situate at different points in the State; that the Erie Basin barge-canal public terminal, one of the number, is situated upon the Buffalo Harbor, adjacent to Lake Erie, within the city of Buffalo,

embraces about 8 acres of land, and comprises two covered piers, 500 and 400 feet long, respectively, with electrically operated machinery for loading and unloading lake, river, and canal craft, and also trains and trucks coming to the piers; that defendant is subject to the jurisdiction of this commission and operates a railroad partly within the State; that its railroad tracks bound the eastern part of the terminal, and physical connection between the standard-gauge railroad tracks laid by the State within the terminal premises, 38 extending down to and around the piers, and defendant's tracks outside the terminal has been made; that the terminal has been completed at a cost of about \$2,300,000, and has been ready for operation since the spring of 1920; that defendant reaches industries in and about Buffalo and interchanges traffic with all railroads serving that region and within the jurisdiction of this commission; that the only method of interchanging traffic between the aforesaid terminal and canal and the said railroads and industries is over defendant's tracks and by means of the physical connection aforesaid; that the said connection and terminal tracks are suitable, safe, and proper for the purpose, but, in the face of repeated demands, defendant has always unreasonably and unlawfully refused, now refuses, and threatens to continue to refuse to interchange any traffic with said terminal on behalf of itself or any other common carrier within the jurisdiction of this commission; that a considerable business, warranting such interchange, has developed and is developing, justifying findings of public convenience and necessity; that the character of traffic attempting to move, but prevented by defendant, and of the traffic moving, generally eastbound and westbound, is largely interstate, although there is a considerable and important intrastate traffic so attempting to move, but prevented from moving, through said terminal; and that an application for relief, heretofore made to the Public Service Commission of New York, failed because it was held by the courts of the State that jurisdiction for the purpose is vested exclusively in this commission.

The prayer for relief is that, pursuant to the provisions of section 6, paragraph (13), of the interstate commerce act, (1) defendant 39 be required to furnish a transportation service between said Erie Basin terminal and shippers located on defendant's tracks in the city of Buffalo, shippers located on its tracks at any other point in said State, and shippers located at any other point in said State on the tracks of any other railroad with which defendant can interchange traffic (2) that such transportation service shall include the furnishing by defendant of necessary rolling stock for movement of traffic between said terminal and shippers located on defendant's tracks at all points in said State, the operation upon the said terminal tracks, by defendant's motive power and servants, of all rolling stock moving to or from said terminal, and the spotting, placing, and removal of rolling stock therein and therefrom; and (3) that defendant establish proper rates for such service. It also is asked that any other carrier sub-

ject to our jurisdiction, the presence of which may later appear to be necessary to a proper disposition of the complaint, be joined as a party.

A preliminary question should be noticed. Defendant filed an answer in which, among other things, it challenged the sufficiency of the complaint upon the grounds that neither complainant is a common carrier by water or by rail, and that no such carrier by water as is necessary to an exercise of the jurisdiction invoked had been made or had become a party to the proceeding. At the first of the two hearings had in the case the challenge was renewed, whereupon a joint petition in intervention in behalf of the Rochester Terminal & Canal Corporation and the Interwaterways Line, Incorporated, common carriers by water operating canal boats, tugs, and other transportation equipment upon the barge canal, was tendered.

40 Over defendant's objection, the examiner permitted the petition to be filed. This was followed by a motion by counsel for complainants that the complaint be amended to make the interveners, and also an industrial concern included in the caption but not in the text of the petition, additional parties complainant; and that the prayer be amended to embrace an interchange of all traffic, interstate and intrastate, that can possibly reach the Erie Basin terminal over defendant's line. Over defendant's further objection the examiner granted the motion, and treated the complaint as so amended. The hearing thereupon proceeded.

Defendant's objections were upon the ground that the effect of the intervention and the amendment was to enlarge the issues, to meet which the time prescribed by our rules of practice had not been accorded defendant for preparation of its defense. The intervening petition contains no allegations respecting the merits, but defendant contends that, because of the alleged jurisdictional defect of parties, the complaint presented no justifiable issue at all when filed, and that the intervention or amendment, if allowable, presented for the first time a cognizable cause of action. Therefore, it is contended, defendant was called upon to meet a new issue, in contravention of its rights. On brief, the further contention is made that, inasmuch as the complaint thus set up no cause of action, there was pending before us no proceeding in which an intervention could be had; but it is admitted that if the intervention or amendment was properly allowed it cannot now be contended that defendant has not had opportunity to meet the issues thus presented.

As above intimated, and because of the questioned action of
41 the examiner, we assigned the case for further hearing, with an interval of time considerably in excess of that provided by our rules of practice. Complainants, interveners, and defendant were represented at the further hearing, but adduced no additional evidence. Counsel for defendant merely renewed a motion made at the prior hearing that none of the evidence thus far taken be considered in behalf of the intervening parties, which motion counsel for complainants resisted.

Whether the additional parties be regarded as interveners or as complainants by amendment (for convenience, they will be treated as interveners), and assuming for the moment that they were necessary parties, their inclusion in support of the complaint has, in the light of the further hearing had, denied to defendant the benefit of no meritorious defense or adequate time or opportunity to prepare and present it. Defendant has also at all times and in all instances had full opportunity to cross-examine the opposing witnesses. Incidentally, a large part of the evidence, including all that has been submitted for defendant, is embraced in a transcript of the proceedings before the State commission, introduced by complainants at the first hearing without objection by defendant. Even granting that the examiner erred at the time, the ultimate result has been the same as if the intervention or an appropriate amendment had been filed with and allowed by us seasonably before the first hearing. It is not disputed that defendant has had its day in court, and we think the objection not well taken.

Turning to the merits, a prefatory explanation of the origin of the case is appropriate. The record discloses that in October,

1919, the superintendent of public works filed a complaint with
42 the public service commission of the State, second division, under a State statute almost a literal copy of the Federal statute, in which complaint, as here, an order was sought requiring the same defendant to operate the connecting terminal tracks and prescribing regulations therefor. The case having been duly heard, that commission entered an order requiring defendant to provide the service detailed in the prayer of the complaint before us, and to file tariffs covering the service into and out of the terminal and over its connecting lines.

A petition for rehearing having been denied, defendant invoked a judicial review of the order. The appellate division of the supreme court of the State, third department, held, among other things, that power to grant the relief sought is by virtue of section 6 (13) of the interstate commerce act vested exclusively in this commission. The court ordered the vacation of the order of the State commission and the dismissal of the proceeding. 198 App. Div. 436. Upon appeal, the order of the court below was affirmed by the court of appeals of the State, without opinion. 236 N. Y. 606.

The decision of the highest court of the State having been in favor of the right or immunity under the Federal statute especially set up by defendant, a writ of error from the Supreme Court of the United States could not be sued out, and the State commission petitioned that court for a writ of certiorari (act of September 6, 1916, 39 Stat. 726, c. 448) upon which to secure in that tribunal a review of the Federal question. The petition was denied, 258 U. S. 621, and the pending complaint was then filed. While the withholding of
43 the discretionary writ of certiorari did not imply an affirmation, it left outstanding the decision of the State court of last

resort, under which complainants and others are, at least for the time being, concluded from further recourse to the State commission.

Tonawanda is the western terminus of the barge canal proper, but that point is situated upon the east bank of the Niagara River, by means of which connecting waterway the canal craft reach the Buffalo Harbor. The State has constructed and equipped, and maintains, the barge canal for the public use. The improved canal system, which provides a channel with a depth of 12 feet and a minimum cross-section area of 1,125 square feet, extends from terminals in the city of Buffalo down the Niagara River to Tonawanda, thence easterly to the Hudson River at Waterford, with connection via the latter river with terminals in the New York City Harbor. It also has branches extending north from Waterford to Lake Champlain, north from the vicinity of Syracuse to Lake Ontario, and south to Cayuga and Seneca Lakes. The State is not a common carrier of commerce, intrastate or interstate, but it furnishes the canal and its facilities without charge to common carriers by water. Terminal docks, piers, warehouses, and railroad tracks have been constructed at various points along the canal, and equipment for transferring or handling freight has been installed.

The navigation season opens about May 1 and closes about December 1. The capacity of the canal, as now improved, is from 15,000,000 to 20,000,000 tons per season. The locks are of such dimensions that barges of 4,000 tons displacement may pass through. About 600 barges, with an average displacement of 2,500 tons, have been operating between Buffalo and New York during the 44 past two seasons. A list of the principal canal carriers operating in and out of Buffalo, as exhibited by complainants, is given herewith, with a description of the service they render:

Inland Marine Corporation.—Operates 11 cargo-carrying steamers of 185 tons capacity, and 75 cargo barges of 300 to 600 tons capacity. Service embraces bulk-cargo movement between Buffalo and points within lighterage limits of New York Harbor, and a carload and less-carload service from New York to Buffalo, with interchange at Buffalo with the Lake lines from Chicago, Cleveland, Detroit, Duluth, Milwaukee, Minneapolis, St. Paul, and points in Minnesota, North and South Dakota, Montana, western Canada, and the North-west Pacific States, on joint canal-and-lake and canal-lake-and-rail rates.

Interwaterways Line, Inc.—Operates 5 steel motor ships, of 1,500 tons capacity each, in a bulk-cargo service between New York and Buffalo.

Murray Transportation Company.—Operates 12 300-ton and 29 500-ton barges, 12 600-ton deck-loading barges, and 3 tugs, for bulk cargoes between points in New York Harbor and ports on or reached via the New York State canals.

New York Canal & Great Lakes Corporation.—Renders service on bulk cargoes between New York and canal ports, and a non-break-

bulk service to Lake Erie ports. Operates 51 750-ton steel cargo barges, 3 750-ton wooden barges, and 15 450-ton cargo-carrying power boats.

45 Rochester Terminal & Canal Corporation.—Operates 10 450-ton wooden barges, with three power units. Shipments contracted for movement to and from all New York State canal and Long Island Sound ports. Merchandise shipments between New York and Rochester handled upon prior arrangement.

Transmarine Corporation, Canal Division.—Operates 30 400-ton steel barges, with 5 towing tugs. Service rendered comprises bulk-cargo movement between Buffalo and New York Harbor points, and merchandise service westbound from New York Harbor points to Buffalo and west thereof, reached by lake connections on joint canal-and-lake and canal-lake-and-rail rates. Principal ports are Buffalo, Cleveland, Detroit, Chicago, Milwaukee, Duluth, Superior, Minneapolis, and St. Paul.

In addition about 20 carriers are operating in intermittent service between canal ports. The interveners are among the canal carriers which do not file tariffs with us or with the State commission. Information as to rates and other transportation matters is available to shippers through the office of the superintendent of public works.

As stated in the complaint, the Erie Basin terminal is situated upon the harbor, adjacent to Lake Erie, within the city of Buffalo. The basin has been dredged to a depth of 20 feet. The terminal covers an area of approximately 9.25 acres. The expenditure for the site, construction, and equipment of the terminal has amounted to \$2,300,000, some \$60,000 of which has been for railroad tracks. There are

two covered piers or docks, 150 feet wide and 500 and 400 feet

46 long, designated as Pier No. 1 and Pier No. 2, respectively. Pier No. 1 has a steel and brick warehouse, with a floor area of 35,000 square feet. Pier No. 2 has a frame warehouse, with a floor area of 6,400 square feet. The machinery for loading and unloading includes two electrically operated semiportal jib cranes, with a capacity of 3 tons each, package conveyors, traction cranes, and miscellaneous hand-operated and power-operated devices. The terminal has over 5,000 feet of standard-gauge railroad tracks, with turnouts, and a storage yard with a capacity of 30 cars. These tracks extend from both sides of Pier No. 1 and from the north side of Pier No. 2 to the westerly bounds of defendant's right of way paralleling the water front, the curvature near the point of connection ranging from 10° to 21°. Defendant has installed a switch, with turnout from its westerly track, forming a connection with the terminal tracks. This westerly track is a siding having a dead end about 400 feet north of the switch point of the turnout. Because of the length of the wheel base and the weight of the modern U-type engine used in switching service, defendant has discontinued the construction of industrial sidings with a greater curvature than 12° to 15°. However, the curvature in reaching the terminal tracks

compares favorably with that of other tracks, leading to water-front properties in the vicinity, operations over which do not appear to have been abandoned by defendant.

Defendant's tracks adjacent to the terminal are also used by the Michigan Central, the Toronto, Hamilton & Buffalo, and the Grand Trunk, and about 100 passenger trains pass over them each day. They are also used in switching service between defendant's facilities and interchange points with its connecting rail lines. Defendant has on occasion spotted cars on the switch connection and removed cars therefrom and expresses willingness to do so in the future, but it refuses to operate over the State's tracks. As the State and the canal carriers have no railroad motive power or cars, and it would be impracticable and uneconomical for them to purchase and operate the same, the practical effect of this refusal is to preclude any interchange of traffic at the terminal between the rail and canal carriers.

During 1922 the canal carriers interchanged about 1,106,000 tons of freight at Buffalo with the lake carriers, of which about 550,000 tons consisted of ex-lake grain. In addition, they brought about 38,000 tons of local traffic into Buffalo and took about the same amount outbound. Approximately 75 per cent of the traffic on the canal is interstate. Traffic officials of five of the principal industries at Buffalo testified in behalf of complainants. Two of them have their own docks, but desire to make less-than-barge shipments via the Erie Basin terminal. Of the remainder, two have water connection with the terminal, but have no docks at their plants. The traffic manager of the Buffalo Chamber of Commerce estimates that the volume of traffic that would move over the connection, if the proposed service were established, would range from 100,000 to 125,000 tons per year. One of the principal shippers estimates that its traffic alone would amount to 20,000 tons annually.

Defendant's main line between Buffalo and New York practically parallels the barge canal and serves all important points reached by it. The relief sought is seriously objected to upon the ground that the result would be to divert to the canal much traffic now moving over defendant's line, including traffic to and from industries located on its rails, and to compel defendant to accept, in lieu of remunerative line hauls, switching movements at relatively small charges. The further point is stressed that numbers of industries in Buffalo are not located upon rail lines and must dray or truck their traffic in any event, and it is urged that industries on defendant's rails, if desiring to utilize the canal, should also dray or truck their traffic thereto or therefrom or avail themselves of their water connections where existent. While a curvature of 21° apparently would be encountered on but one of the tracks entering the Erie Basin terminal, it is testified that the desired service would seriously interfere with the already congested main-line operations. It is proposed to four-track the main line passing the terminal, and when this is done the present third track, now used for

the connection with the terminal tracks, will become a main passenger track. This, if the docks were to be served, would necessitate the installation of an interlocking plant, at a cost of \$150,000.

By section 6, paragraph (13), of the act, under which the complaint is filed, it is provided that—

“When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:”

49 As provided by the further subdivisions of that paragraph of the section, the purposes for which our jurisdiction may be invoked and exercised are (1) to establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection with a track or tracks constructed from the dock to the limits of the railroad right-of-way, or, subject to the same restrictions as to findings of public convenience and necessity and other matters as is the construction required under section 1 of the act, by directing either or both the rail and water carriers, individually or jointly, to construct and connect with the rail lines a track or tracks to the dock, with full authority on our part to determine and prescribe the terms and conditions upon which the connecting tracks shall be operated, and also, either in the construction or operation of those tracks, to determine what sum shall be paid to or by either carrier; (2) to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced; and (3) to establish proportional rates, or maximum or/and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates (which are defined) shall apply.

50 Since physical connection between defendant's line and the terminal tracks already exists, although made pursuant to a contract entered into in May, 1919, between the State and the Director General of Railroads, then operating defendant's railroad, which provides for its termination upon 30 days' notice by either party, that detail is not included in the prayer for relief. On the other hand, while the prayer for an order requiring defendant to furnish a transportation service, including the necessary operations over the terminal tracks, between various State points and the terminal (by amendment, to embrace interstate traffic), is supple-

mented by a prayer that defendant establish proper rates for the service, nevertheless on brief a modified position is taken. By way of response to a point made by defendant that the two intervening barge lines show no intention of becoming subject to our jurisdiction complainants assert that "this has never become a rate case" and that what is sought is "the protection of this commission in regard to a service," with the assumption "that adequate rates will be provided when the service has been commanded."

In *Baltimore & Carolina S. S. Co. v. A. C. L. R. R. Co.*, 49 I. C. C. 176, we rejected a contention by the defendants that under the statute we may prescribe relief in respect of routes and rates only where the water line concerned has a dock. We expressed the opinion that, where either the rail or the water carrier has suitable dock facilities, the ownership or control by the one or the other is immaterial, at least in so far as concerns a prescription of through routes and joint rates or of proportional rail rates to or from the port from or to which the traffic affected is taken by the water carrier, except as the ownership or control may bear upon the question of reasonable compensation for the use of the facilities. We prescribed in that case an establishment of joint rates via a dock owned by a
51 defendant rail line, where the necessary physical connection and facilities for interchange existed. In the instant case the docks and other terminal facilities for interchange at Buffalo are the property of the State of New York, but they are fully available to all canal craft and appear to be adequate for the purposes contemplated by the complainant.

In the light of the State's attitude in the case and its manifested desire to promote the greatest practicable use of the canal, it would follow that, if the requisite construction and track connection had not already been accomplished, the first of the powers granted us under the section hereinbefore outlined could have been exercised upon an invocation of that relief, the concurrence of the State being assured, if other essential elements were established of record. By the same token, since the complete terminal facilities are unreservedly tendered for the necessary use by defendant and such canal lines as may desire to participate in the traffic that would be affected, it is competent for us in an appropriate case to enter an order on the merits which, incidentally or directly, would preclude a severance of the existing connection pursuant to the contract provision before mentioned.

Much of the argument on briefs and at bar, such as concerns our power on this record to prescribe rail proportional rates to and from the Erie Basin terminal, for example, may be disregarded in view of the fact that the relief now sought is limited to a transportation service and a performance by defendant of the operating service over the terminal tracks necessary to an interchange of traffic at the terminal. Only our authority to grant such relief and make it effective need be considered.

52 Defendant's contentions respecting that question are (1) that it is essential to an exercise by us of any power under the section in question that we shall have before us not only a rail carrier but also the water carrier with which the interchange of traffic is to be made, and (2) that we may require such an interchange arrangement to be made only when we can determine and prescribe the terms and conditions upon which the connecting tracks shall be operated, and, therefore, only when we have before us evidence which will enable us to fix those terms. As a corollary, it is insisted that, even if the other facts of record were such as to empower us to act, we could require defendant to interchange traffic only with the two intervening water lines. It is added that, even as to those lines, there is of record no evidence upon which we could determine how the expense of operation should be divided between them and defendant.

We are unable to accede to these contentions, the answers to which do not require extended discussion.

As the foregoing outline of section 6 (13) discloses, we are empowered in appropriate cases to do any one or more of three distinct things. The first is to require an installation of physical connection between a rail carrier's line and a dock at which traffic may be interchanged. If necessary, we may require the rail or the water line, either alone or both jointly, to construct tracks to the dock and connect them with the rail carrier's line. In either foregoing situation, we are fully authorized to prescribe, when necessary, the terms and conditions upon which the connecting tracks shall be operated, or, either in the construction or the operation of those tracks, to determine what sum shall be paid to or by either carrier.

53 The remaining two distinct things we are empowered to do are (1) to establish through routes and maximum joint rates between and over the rail and water lines, and to determine the terms and conditions of operation in the handling of the traffic, or (2) to establish the rail-line proportional rates to and from the port from and to which the traffic is transported by the water line, and to determine to what traffic and in connection with what vessels, and upon what terms and conditions, the proportional rates shall apply.

It is to be observed that the presence in any case of a common carrier by water is an essential element only in an establishment of through routes and joint rates. In the nature of things, for such a purpose the presence of a rail line and a water line would be necessary. In an establishment of rail-line proportional rates we may also designate the vessels in connection with which they are to apply, but that is not obligatory. But neither through routes and joint rates nor proportional rates are here sought. All that is asked is that defendant, with its already available motive power and other equipment, provide the transportation service and perform upon the terminal tracks the operating service necessary to an interchange of traffic at the terminal. Under the terms of the

statute our power to require it is distinct and complete. Under another section of the act we have power to require a railroad to extend its line, and for obvious reasons this includes authority to require the carrier to operate the extension. So, our power to require this defendant rail line to construct or connect with the terminal tracks necessarily includes the power to require that line to perform the operating service. That power is expressly invoked in this case, and nothing is asked of the canal lines.

It also is not necessary that we couple an order for operation
54 of the connecting tracks with a determination and prescription of the terms and conditions of such operation. Complainants have not asked it, and defendant need only make such tariff provision as may be necessary to cover the service into and out of the terminal. If the terms upon which the traffic is so handled shall hereafter be deemed unsatisfactory and unlawful, the way is always open to shippers to file complaint and invoke an exercise of our further jurisdiction, such as a prescription of rail-line proportional rates.

The testimony is that about 75 per cent of the canal traffic is interstate, and not only have the State courts held that our jurisdiction in the premises is exclusive, but that was defendant's insistence before those courts when the order of the State commission was under review.

In our consideration of the case we are also mindful of the legislative declaration in section 500 of the transportation act, 1920, as follows:

"It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

We find it to be in the public interest that defendant should perform the transportation and operating services in accordance with the prayer of the complaint, as amended, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal; and an order to that end will be entered.

EASTMAN, commissioner, concurring: Certain of the conclusions
55 reached in the dissenting opinion are of such far-reaching importance that they merit most careful consideration. As that opinion states, paragraph (13) and its lettered subdivisions were in 1912 by the Panama Canal act first made part of section 6 of the interstate commerce act, then the act to regulate commerce. They conferred new jurisdiction over rail and water carriers. Under their provisions we may require physical connection to be established between a rail line and a water line and prescribe the terms and conditions upon which the connecting tracks shall be operated; we may require through routes and joint rates; and we may also require a rail carrier to establish proportional rates to and from a port to which the traffic is brought or from which it is taken by a water carrier. This jurisdiction exists under the following circumstances:

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation, and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten.

One of the chief points made in the dissenting opinion is that the words "a common carrier or carriers," in the above-quoted paragraph, do not have their ordinary meaning but must be interpreted in the light of the provisions of section 1 of the interstate commerce act. By such reasoning, which is fully set forth and need not
 56 here be repeated, the conclusion is reached that we have no jurisdiction under paragraph (13) of section 6, unless the carrier by water which may or does, in connection with a rail carrier, transport property in interstate commerce "from point to point in the United States * * * through the Panama Canal or otherwise," is under common control or management with some carrier by rail, or has entered into an arrangement with some rail carrier for the continuous carriage or shipment of passengers or property.

It will help, in weighing this conclusion, to consider its results. One of the purposes of the Panama Canal act was to foster competition between rail and water transportation. Thus, it was made unlawful for any railroad company, after July 1, 1914, "to own, lease, operate, control, or have any interest whatsoever * * * in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad * * * does or may compete for traffic." The intent of what is now paragraph (13) of section 6 was clearly to help competing water lines to draw traffic from interior points by means of their rail connections.¹ Experience
 57 has amply demonstrated that ordinarily water carriers can not prosper without such traffic.

Under the reasoning of the dissenting opinion the powers conferred by this paragraph and its lettered subdivisions could be exercised only—

1. Where the water line is under common control or management with some rail carrier, in which case there would seldom, if ever, be need for the exercise of such powers; or

¹ That this was the intent is indicated by the following passage from the report of the Committee on Interstate and Foreign Commerce of the House of Representatives, March 16, 1912, printed as Report No. 423, Sixty-second Congress, second session:

"This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in foreign trade. By that means the benefits of the canal can be distributed through the interior and enable the entire country to enjoy some good therefrom. Instead of competing with themselves by running vessels through the canal, the railroads can perform the more noble and valuable service of connecting on either coast with coastwise vessels passing through the canal, and, by joint rates and through routes, afford convenient schedules and fair rates and conditions of commerce to the people living many hundreds of miles inland from both coasts."

2. Where the water line has already made an arrangement with some rail carrier for continuous carriage or shipment, or, in other words, has already been able to accomplish, in substantial part at least, the object which paragraph (13) was designed to further.

Thus the conditions precedent to the exercise of the powers conferred would rarely exist. It is evident that this construction of the law would reduce it almost to a nullity and certainly to an absurdity. By way of illustration the powers conferred could not now be exercised in connection with any water carrier operating through the Panama Canal, with the possible exception of the Isthmian Steamship Lines controlled by the United States Steel Corporation, which also controls various minor rail carriers. See *Application of United States Steel Products Co.*, 57 I. C. C. 513. Plainly such a construction of the law should be avoided if reasonable ground can be found for a construction in greater harmony with the intent.

It is true that paragraph (3) of section 1 of the interstate commerce act provides that the term "common carrier" as used in the act "shall include," among others, "all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire." It is also true that the reference to transportation "as aforesaid" relates back to the part of paragraph (1) of the same section which states that—

"The provisions of this act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment ; "

But paragraph (13) of section 6 was injected into the act to regulate commerce by the Panama Canal act after the former was amended in 1910, and with the provision that the jurisdiction thus conferred should be "in addition to the jurisdiction given by the act to regulate commerce as amended June eighteenth, nineteen hundred and ten." Moreover, throughout the interstate commerce act, when reference is made to a common carrier which comes within the definition of section 1 and is subject to the general provisions of the act, it is customary to use the words "common carrier subject to the provisions of this act," or words of similar effect, unless the context makes their use unnecessary. In that part of paragraph (13) of section 6, which is in question, such language is not used, but the reference is merely to "a common carrier or carriers"; nor does the context imply such restriction. It is a reasonable inference that it was not the intent to confine or restrict the ordinary meaning of these words within the limitations of section 1.

This conclusion is strengthened by the fact that there are other provisions of the act where the words "common carrier" are plainly used in their ordinary meaning, unrestricted by section 1. Thus in section 25, added February 28, 1920, certain duties are imposed upon "every common carrier by water in foreign com-

merce whose vessels are registered under the laws of the United States." In paragraph (9) of section 5 railroad companies are prohibited from having any interest whatsoever "in any common carrier by water operated through the Panama Canal or elsewhere." And in subdivision (d) of paragraph 13 of section 6 it is provided that if a rail carrier enters into an arrangement for the handling of through business with "any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise," we may require it to enter into similar arrangements with other similar steamship lines. A further illustration will be found in the provisions of paragraph (24) of section 1, noted in the dissenting opinion. Section 15a contains its own special definition of the word "carrier," as does section 20a, the latter definition including "any corporation organized for the purpose of engaging in transportation by railroad subject to this act." Until the amendment of 1920, the definition in section 1 was merely this: "The term 'common carrier' as used in this act shall include express companies and sleeping-car companies." It is evident that this definition was not intended to be all inclusive; nor is the definition in its present form. In the case of water transportation there is particular reason for employing the words "common carrier" in their ordinary meaning, in order to distinguish lines so operated from the many cargo vessels, such as tramp steamers and the like, which are not
60 operated as common carriers. The conclusion that the words are so used in paragraph (13) of section 6 is further strengthened by the fact that any other construction would result, as I have shown, in reducing the provisions of that paragraph and its lettered subdivisions to a virtual nullity.

It follows that our jurisdiction under paragraph (13) of section 6 attaches when property may be transported in interstate commerce by any common carrier by rail in conjunction with any common carrier by water. Query arises as to the meaning of the words "may be transported." It is suggested in the dissenting opinion, as I understand it, that these words mean a possibility of transportation; that this possibility does not now exist, and that indeed we are being asked to act "in order that property may be so transported." This is an unduly narrow construction. Subdivision (a) of paragraph (13) empowers us to require physical connection to be established between the rail carrier and the water carrier. Without such physical connection there is, strictly speaking, no possibility of through transportation. If the suggestion in the dissenting opinion is correct, therefore, we can not establish a physical connection unless a physical connection already exists. Obviously the words "may be transported" must be more broadly interpreted as involving a possibility which may be contingent, in part at least, upon our own action. In this case it happens that a physical connection already exists between the tracks of the rail carrier and the docks which are served by the water carriers, so that no gap exists in the line of communication.

Summing up briefly what the record shows as to the existing situation: It appears that certain common-carrier boat or
61 barge lines operate upon the canal, and that some of these move traffic to and from docks at Buffalo. It appears that from two of the docks in Buffalo which are thus served by water carriers operating upon the canal and which were built and are owned by the State of New York, rail lines, likewise built and owned by the State, extend to the tracks of the New York Central. It further appears that the New York Central is a carrier by rail engaged in interstate commerce and moves traffic between Buffalo and points in States other than New York. The conditions precedent to an exercise of our powers under paragraph (13) of section 6 are clearly present. The suggestion is made in the dissenting opinion, however, that the necessary parties are not before us for the exercise of these powers.

The only defendant is the New York Central. The original complainants were the State of New York and the superintendent of public works, but by amendment two water lines operating upon the canal were made additional parties complainant. If we were asked to establish through routes and joint rates between and over the rail and water lines, under the provisions of subdivision (b) of paragraph (13) it would be necessary to have before us as an additional defendant some common-carrier water line operating upon the canal. But the complaint does not seek the establishment of through routes and joint rates, nor does it seek to require any other action upon the part of the water lines. It merely asks that the New York Central be required to furnish rail service to and from the docks. Under the circumstances, no reason appears for making any common carrier by water a defendant.

62 Examination of paragraph (13) of section 6 shows that it contemplates alternative methods of conducting the rail-and-water transportation. Under one method the rail and water lines join in through routes and joint rates. Under the other method no such through routes and joint rates are established, but the rail line is required to move traffic to and from the docks, charging either local or proportional rates for this service. Subdivision (c) specifically empowers us to require the establishment of such proportional rates. This power is not invoked here, but, if it were invoked, clearly it would be necessary to name only the rail line as a defendant. The same is true of subdivision (a), which empowers us to require the establishment and operation of a physical connection between the rail and water lines. Under this subdivision complaint may be directed against either the rail line or the water line or against both. No reason appears why complaint should not be directed against the rail line alone, if it can be shown that public convenience and necessity require that the physical connection be established or operated by the rail carrier.

This is precisely what is shown by the record in this case. The State of New York has laid rails connecting the New York Central

tracks with the docks. No water line is equipped to operate over these rails, or could so equip itself without disproportionate expense. The New York Central is so equipped and can operate over these rails, which the State has laid, as readily as it now operates over many other similar spur-track connections in Buffalo. In prescribing the "terms and conditions upon which these connecting tracks shall be operated," we have only prescribed that they shall be operated by the New York Central. Other terms and conditions are, for the present, left to be agreed upon by that railroad and the
63 State. The railroad can hardly complain of this arrangement, for it is left free to publish such tariff charges for the service as it sees fit, subject to subsequent protest or complaint. The State might conceivably be aggrieved, for the compensation, if any, which it shall receive for the use of its property is left undetermined. However, the State has not asked that we fix such compensation. Since no property of water lines is to be used and since no new service is to be required of them, they do not enter into the problem.

The conclusions which the majority have reached are supported by the prior action of the Public Service Commission of New York and of the courts. Under a similar law, upon a similar complaint involving intrastate service, and upon practically the same record, the New York commission entered an order requiring the New York Central to perform the service sought. Upon appeal from this decision, the New York Supreme Court made the following finding:

"No provision of the State or Federal Constitution is violated by the enactment of the statute or by the order of the Public Service Commission. The service required to be rendered by the relator is a part of transportation which railroads may be required to perform. The order is a regulation of the business of the corporation, and is not an appropriation of its property for the use of the State or of another. *Grand Trunk Railway v. Michigan Railroad Commission*, 231 U. S. 457, 468. For the services rendered the relator is to be compensated. Neither the rolling stock, nor the men furnished,
64 are taken from the possession and control of the relator. The order is made by the Public Service Commission, under the authority of the statute and after a full hearing, of which the relator had notice and at which the relator attended and was heard. The due process of law provision and the just compensation provision of the Constitutions are not violated."

The court went on to say, however, that Congress had given similar power to this commission, and, after discussion of this situation, reached this conclusion:

"Congress having exerted its authority to regulate interstate commerce by the direction and control of connections between rail carriers and water carriers, the entire subject of such connections is removed from the operation of the authority of the State, and the power of the State to regulate such connections and the operation of them ceases to exist; when the Federal Government has exercised

its power, it covers the whole field, and even if, in certain details, the State act differs from the Federal act, such State act is still inoperative."

This decision is reported in 198 App. Div. 436. Upon appeal, the order of the court was affirmed by the Court of Appeals of New York, without opinion. 236 N. Y. 606. Moreover, a petition to the Supreme Court of the United States for a writ of certiorari to secure a review of the Federal question was denied. 258 U. S. 621.

It therefore appears that the sufficiency of the action of the Public Service Commission of New York, which was in essential respects similar to the action which we are now taking, was not questioned by the court except upon the ground that Congress had occupied the field by its grant of power to this commission, thus making the State law inoperative. This brings up the final point raised in the dissenting opinion, namely, that our order should by its terms be confined to interstate service. In view of the action of the courts which is above described, including that of the Supreme Court of the United States, we are warranted in proceeding upon the assumption that our order may properly cover intrastate as well as interstate service. Indeed, it seems to me that, in view of the manner in which possible action by the Public Service Commission of New York with respect to the intrastate service has been eliminated, we should be derelict in our duty if we did not attempt to cover the entire field by our order.

HALL, chairman, dissenting: A great State has spent great sums in building a great canal for public use. In the endeavor to promote that use, not by itself but by others, it has gone to its own commission and, turned back by the courts, now comes to us. The effort, the purpose, the sacrifice already made, are for and by the public. We should aid if we can without injustice to other servants of the public. But can we, upon the showing here before us?

The only complainants are the State of New York and one of its officials. In their complaint against the sole defendant, the New York Central, a common carrier by railroad subject to the interstate commerce act, they allege no violation of that act, and none was shown at the hearings. The two interveners make no allegations and seek no relief. The complaint, considered as a complaint under section 13 of the act, must therefore be dismissed.

But, in its essence, the complaint is a petition invoking exercise of our powers under paragraph (13) of section 6 of the act. That paragraph declares our jurisdiction to require the doing of certain things which the act itself does not require of common carriers subject thereto. Our jurisdiction to so require becomes operative only when certain conditions coincide. These are set forth in that portion of paragraph (13) which precedes subdivision (a) and have remained unchanged since 1912, when this paragraph was first made part of section 6 by the Panama Canal act.

The conditions which must thus coincide will be designated by numbers and italics in the text here quoted of the portion referred to:

"(13) When (1) *property* (2) *may be or is transported* (3) *from point to point in the United States* (4) *by rail and water* through the Panama Canal or otherwise, (5) the transportation being by a common carrier or carriers, and (6) *not entirely within the limits of a single State*, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten":

Without pausing to consider whether such transportation of one kind of property, e. g., grain or coal, would call for jurisdiction by us over the carriers in their transportation of all other kinds of property, or whether the words "may be * * * transported" and "may * * * engage in the same" refer to a possibility at

the time of enactment which shall have ripened into actuality at the time our jurisdiction is invoked, or a physical possibility not yet realized at the time of invocation, or a showing that movement will take place if our jurisdiction is exercised, or have some other meaning, it seems fairly clear that our jurisdiction under this paragraph attaches only to transportation of property by rail and water, from point to point in the United States and not entirely within the limits of a single State, by a common carrier or carriers, and to the common carriers, both by rail and by water, which may or do engage in that transportation. Intrastate and foreign commerce are not within the purview of the paragraph. It seems to be equally clear that, unless such a common carrier combines in itself the two functions of a common carrier by rail and a common carrier by water, there must be at least two common carriers, one by rail and one by water, which "may or do engage" in this interstate transportation.

What is meant by the term "common carrier" as used in this paragraph? That question is answered by section 1 of the act in so far as the rail carrier is concerned. Every railroad engaged in interstate transportation of property as a common carrier for hire is a common carrier subject to the act. Not so with a water carrier. Unless it and the rail line are used under a common control or management, it must be used with the rail line under some "arrangement for a continuous carriage or shipment" to come under the provisions of the act. Section 1 (1) (a). Issuance by the rail carrier of a through bill of lading covering rail and water movement in foreign commerce, as prescribed by us, "shall not be held to constitute 'an arrangement for continuous carriage or shipment' within the meaning of this act." Section 25 (5). Absorption by a water carrier in interstate or foreign commerce, out of its port-to-port rates, or out of its through proportional rates, of certain switching or other charges of the rail carrier does not

suffice to subject it to the act. Section 1 (2) (c). With these qualifications plainly stated, the act declares in section 1:

"wherever the word 'carrier' is used in this act it shall be held to mean 'common carrier.'" Sec. 1 (3).

and—

"the term 'common carrier' as used in this act shall include * * * all persons, natural or artificial, engaged in such transportation * * * as aforesaid as common carriers for hire." Sec. 1 (3)—

thus referring back, in so far as water lines are concerned, to the phrase in section 1 (1) (a)—

"* * * or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment;"

In *Jurisdiction Over Water Carriers*, 15 I. C. C. 205, decided in 1909, we said at page 207:

"As a fundamental proposition it is obvious that interstate commerce wholly by railroad is subject to the act and that interstate commerce wholly by water is not subject to the act. It is equally obvious that interstate commerce partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment, is subject to the act."

And we reached the conclusion, as succinctly stated in the syllabus, that—

69 "Carriers of interstate commerce by water are subject to the act to regulate commerce only in respect of traffic transported under a common control, management, or arrangement with a rail carrier, and in respect of traffic not so transported they are exempt from its provisions."

If it be said that the subsequent amendment of section 6 by the Panama Canal act in 1912, and its further amendment by the transportation act, 1920, into the paragraph (13) of that section now before us, have changed the law so that water lines are no longer exempt in the absence of such common control, management, or arrangement, we shall do well to remember that since 1912 common carriers by water on the high seas or the Great Lakes have been made subject to the shipping act, 1916, and later to the merchant marine act, 1920, which was approved on June 5 of that year and thus subsequent to the approval on February 28 of the transportation act, 1920, and that the transportation act not only amended paragraph (13) of section 6 to read as it now reads, but also amended sections 1 and 25 by inserting the qualifications already noted to the effect that neither absorption of rail switching charges by the water carriers under the circumstances specified, nor issuance by the rail carrier of a through bill of lading under the circumstances there specified, should constitute an arrangement for continuous carriage or shipment within the meaning of the act. Why should the Congress be at these pains to hedge about the jurisdiction conferred in

the interstate commerce act over carriers by water if in paragraph (13) of section 6 it was throwing down the bars?

70 Coming back to the words "common carrier or carriers" and "the carriers, both by rail or by water," as used in paragraph (13), shall we construe them, whether the carrying is by rail or by water, as meaning common carriers subject to the act? The general meaning declared in section 1 should apply here unless the context clearly indicates otherwise. My brother EASTMAN, in his concurring expression, cites sections in which the context would seem to indicate otherwise, and among them section 25. In paragraph (1) of that section appears the term "common carrier by water in foreign commerce," which is the same as that defined in the first section of the shipping act, 1916. That imported term, appearing as it does in extraneous provisions which in no wise submit such carriers to any jurisdiction by us, unless the "regulations" which we may make as to reservations from unsold space and the filing with us of sailing schedules mean jurisdiction should no doubt be regarded as an exception from the general rule. There may be other exceptions. Reference is also made in the concurring expression to the fact that usually the words "subject to this act" follow the term "common carriers" where it appears in the act. If I am correctly informed, it was to remove the uncertainty which might be felt in cases where those words were not appended² that the meaning of the words "carrier" and "common carrier" as used in the act was expressly declared in section 1.

In paragraph (13) the context hardly tends to show that the word "carriers" is used in a different sense from that declared generally in section 1. It may be helpful to consider in what ad-
71 ditional particulars jurisdiction is there conferred upon us.

These particulars are set out in subdivisions (a), (b), and (c).

Under subdivision (a) we may require establishment of physical connection between the lines of the rail carrier and the dock at which interchange is to be made with the water carrier; we may do this by directing the rail carrier to connect with tracks which have been constructed from the dock to the limits of its right of way, or by directing "either or both the rail and water carrier, individually or in connection with one another," to construct tracks to the dock and connect them with the lines of the rail carrier; we may prescribe the terms and conditions upon which these connecting tracks shall be operated and may, either in construction or operation of these tracks, determine what sum shall be paid to or by *either* carrier; all with the proviso that construction required by us under this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity *and other matters* as is construction *required* under section 1 of the act. In paragraph (9) of section 1, the requirement upon a common carrier subject to the

² For significant instances in which the words "subject to the act" are not appended, see sections 3 (4), 5 (11), 6 (7), 13 (3), 15 (3), (4), (5), (6), (7), (9), (10), 16 (2), 22 (1), and 23, among others.

act to construct, maintain, and operate a switch connection is qualified by the words, "where such connection is reasonably practicable and can be put in with safety *and will furnish sufficient business to justify the construction and maintenance of the same.*" (Italics mine.) It may be mentioned parenthetically that in this proceeding there is no showing or finding of a volume of business which will justify maintenance or operation. The construction has already been made.

Under subdivision (b) we may establish through routes and
 72 maximum joint rates between and over such rail and water lines, and determine all terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

Under subdivision (c) we may establish proportional rates by rail to or from the ports to which the traffic is brought or from which it is taken by the water carrier, and determine to what traffic, in connection with what vessels, and upon what terms and conditions such rates shall apply. These proportional rates are to apply only to traffic which is brought to the port or carried from the port by a "common carrier by water."

Subdivision (d) seemingly provides for the exercise of other powers under other conditions than those which must be found to coincide in order to bring into operation our functions under (a), (b), or (c).

The particulars here summarized, and some of them italicized, demonstrate that, when the prerequisite conditions coincide, we are called upon to exercise jurisdiction in these respects over a dual form of transportation, by rail and by water, engaged in by carriers upon either or both of whom we can impose requirements by our orders.

As is well known, our jurisdiction differs in two important aspects from that of the courts. It is purely statutory, and it is unilateral. Parties are not before us on equal terms. We may entertain complaints by shippers against carriers, but not by carriers against shippers. We may not consider cross-complaints or counterclaims, or offsets, by defendant carriers against complaining shippers. We can make no orders which are enforceable except against common carriers subject to the act. Private carriers are not subject to the

act. Common carriers by vehicles on highways, or by aircraft, are not subject to the act. Common carriers by railroad
 73 engaged exclusively in intrastate commerce are not subject to the act. Whether and to what extent common carriers by water are subject to the act is the subject now before us. It should be observed, as lying at the root of the present inquiry, that whether or not a carrier is a common carrier subject to the act depends upon what it is or does or holds itself out to do and not upon what we do. No authority is given to us anywhere to lay hold upon a carrier which is not subject to the act and convert it by some order or requirement of ours into a common carrier subject to the act, bound by our order.

What, then, are these water carriers upon which paragraph (13) is to operate? Are they common carriers subject to the act, or, at least, must they be such, as is the defendant rail carrier, when we essay exercise of the jurisdiction given in these particulars by requiring the rail carrier, or the water carrier, or both, to do this thing or that included among the "particulars"? Nothing in the wording of the paragraph indicates that the two kinds of carriers are to stand before us on a different footing. We can only "require" by order. If the rail carrier were not subject to the act the naming of it in this paragraph would not make it amenable to our order, and the same would seem to be equally true of the water carrier. Both must be there, and alike amenable to order, if we are to be free to exercise the jurisdiction conferred, as, for example, to select which shall operate the rail connection, and how much, if anything, the other is to contribute toward the cost of that operation, or to prescribe joint rates, binding upon each participant, or to exercise sound discretion in any of the other particulars. It can not be that we could require the rail carrier to bear all the

74 expense of operation for no other reason than that the water carrier is not before us, and would not be bound by our order if it were before us. From beginning to end of the act is manifested the intent of Congress that carriers by water shall not be subject to the provisions of this act and thus to our jurisdiction, unless they make with rail carriers an arrangement for continuous carriage or shipment in interstate or foreign commerce.

My brother EASTMAN challenges this view in so far as the water carriers are concerned. He says that this construction of paragraph (13) would reduce it "almost to a nullity and certainly to an absurdity." He quotes from the House committee which reported out the bill in 1912 as follows, in part:

"This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in foreign trade."

Here, at least, is a grouping in the mists of illusion. No such "practices" obtained then or obtain now, and this for the sufficient reasons, if there were no other, that the ocean carriers operating such vessels in foreign trade were not and are not subject to the act. The line of interpretation which I have suggested may strip paragraph (13) of some imagined force, but much of substance remains. When the paragraph was enacted in 1912 the commission had no jurisdiction, and has none now, in the particulars specified in (a) except as conferred by this paragraph. It had and has no

75 jurisdiction to determine to what traffic and in connection with what vessels and upon what terms and conditions such maximum proportional rail rates shall apply except under (c). True it is that by subsequent amendments, and notably by the transportation act, 1920, enlarged powers were given us which cover and include to a considerable extent some of the particulars originally

specified in this paragraph. The recital of them would be tedious. But then, as now, the Congress sedulously provided in what is now section 15 (3)—

“ * * * that any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water.”

My brother EASTMAN says that my construction of “common carriers” dwarfs the paragraph. His makes it Gargantuan. For it would make our jurisdiction in these additional particulars, and also under the entire act, extend to all common carriers of property by water in interstate commerce, whether subject to the act or not. At one gulp it swallows all these carriers by water, whether on river or canal, the Great Lakes or the high seas, many of them already subject to the shipping act, 1916, and the merchant marine act, 1920. They are not subject to our act, and do not desire to be, but when the conditions coincide they would be brought perforce and against their will within our jurisdiction not only in the “particulars” specified in subdivisions (a), (b), and (c), but also—

“the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten—”

76 and thus presumably the jurisdiction given by the act as it stands to-day. If the additional jurisdiction can be exercised over carriers not subject to the act, the other and broader jurisdiction can be, also. Thus, everything that the act requires of common carriers by water subject to the act we may call upon these water carriers to perform. They must file with us and strictly observe their tariffs. Their rates must be just, reasonable, and free from unjust discrimination, undue prejudice, or undue preference. Complaints against them for violation of the act may be heard and determined by us. With our orders they must comply. To my mind the sounder view is that no jurisdiction, whether as expressed in these particulars under paragraph (13) or in the act as amended in 1910, or in the act as it is to-day, has been given to us except for exercise over common carriers subject to that act, and that no attempt by us to exercise jurisdiction will subject carriers to that act.

This detailed inquiry into the meaning of the terms “common carrier” and “carrier” by water as used in paragraph (13) may seem academic, but it is proper to weigh words before we attempt to apply them, and to seek for them an interpretation which is not repugnant to other provisions, until the courts shall set the matter at rest.

Whatever the meaning of those words may be, the plain intent of the paragraph is to foster a dual form of transportation. There must be a rail carrier and a water carrier. In the interstate movement of property we are to bridge the gap, if one exists, between the rail carrier and the water carrier, or, if none exists, to substitute a more convenient method of connecting the two. By joint or proportional rates, and otherwise, we are to facilitate the interstate transportation of property by rail and water from origin to destination.

Let us, then, consider to what extent complainants have made their case by showing that the coincident conditions which give rise to our jurisdiction are here present. They affirmatively show that property is not being transported from point to point in the United States by rail and water through the canal by defendant and any other common carrier or carriers, but, apparently in order that property may be so transported, they seek an order against defendant to the effects recited in the majority report. They show that the State is not a common carrier through the canal; that various canal lines are operated there; and that some of them transport property from Buffalo to New York. It is alleged that these canal lines are common carriers.

Defendant comes within the term as a carrier by railroad. It does not operate as a common carrier on the barge canal. There is no showing that its railroad and the waters of the barge canal are used under a common control, management, or arrangement for a continuous carriage or shipment. Indeed, the contrary plainly appears. It would seem, therefore, that the two canal lines which have filed petitions in intervention do not come within the term "common carrier" as used in the act. But, however that may be, it is not shown that they or any other carriers on the canal seek to become or to be recognized as common carriers subject to the act. The two interveners ask no relief in their petitions. One of them, the Rochester Terminal & Canal Corporation, handles shipments under contract or "prior arrangement." Its representative testified that it handles no westbound traffic moving through the port of Buffalo and receives directly no traffic from Buffalo eastbound. The other, the Interwaterways Line, Incorporated, is already principally engaged in transporting ex-lake grain eastbound for export. Its representative testified that it is free to increase or reduce its rates at will, without control by any public body. To what extent either would be available for the through transportation contemplated by the statute is not made to appear. No other canal line is party to this proceeding. Manifestly, the jurisdiction here invoked is a jurisdiction over the water carrier as well as the rail carrier, and can not be exercised if the water carrier is not a party to the proceedings.

Moreover, the same section 6 which expressly declares in paragraph (1) that "The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act" requires earlier in that paragraph that every common carrier subject to the act shall file with us, print, and keep open to public inspection schedules showing all rates for transportation between points on its own route and points on the route of any other carrier by railroad or by water when a through route and joint rate have been established, or, if no joint rate has been established, that the several carriers in such through route shall file, print, and keep open to public inspection the separately established rates applied to the through transportation. These provisions apply to the water carrier

as well as to the rail carrier participating in the through transportation, a conclusion fortified and settled by the prohibition set forth in paragraph (7) of the same section 6, reading:

79 "No carrier * * * shall engage or participate in the transportation of * * * property, as defined in this act, unless the rates * * * upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act;"

As already observed, the object of paragraph (13) is that traffic may move by rail and water. When that end is sought through an exercise of jurisdiction on our part, it is in terms to be attained through an exercise of that jurisdiction which we shall have over the through "transportation" and over the "carriers, both by rail and by water," which are to comprise the necessary through route. Unless and until we have jurisdiction of both common carriers, the carrier by rail and the carriers by water, we have jurisdiction over neither in the particulars set forth in paragraph (13). It is for the establishment of a through route, partly by rail and partly by water, that we are to act, if we act at all. That is the unmistakable intendment of the paragraph. Only such action as would accomplish that end would or could promote the manifest legislative intent. Even apart from what the act itself requires, it would not be in the public interest to exact such service from a common carrier by rail without appropriate assurance of the requisite participation by some certain common carrier or carriers by water. It is not made to appear that either of the canal lines which intervened in this proceeding holds itself out or seeks to participate in through transportation subject to the act, including the foregoing provisions, or is now a common carrier by water subject thereto; and, as no other carrier by water is a party, the proceeding must be dismissed for lack of necessary parties.

80 Here I might stop, but the majority are so far from stopping that they enter an order requiring the defendant to render services which embrace both interstate and intrastate traffic. They conclude that we may deal with the New York Central alone, in the absence of any common carrier by water, and require it to provide a transportation service, including operation upon the Erie Basin terminal tracks, such as would be necessary for interchange of traffic with canal lines unknown and unnamed. In its practical effect this order requires defendant to operate over the State's terminal tracks, regardless of whether the services so rendered cover only local switching, unrelated to interstate commerce, or are otherwise confined to intrastate traffic. Power to require operation of such connecting or terminal tracks by either carrier, rail or water, is not specifically granted to us by paragraph (13). If it exists, it is to be found only in the grant of authority to determine and prescribe the "terms and conditions" of such operation, which might involve payment by the water carrier, and which we can not now determine or prescribe for the additional reason that the

necessary evidence on which to base such determination is lacking, as the majority virtually concede. Let it be recalled again that the conditions which must coincide, and upon which our jurisdiction rests, provide that when, and therefore only when, property may be or is transported from point to point in the United States, thus apparently excluding foreign commerce, by rail and water, the transportation being by a common carrier or carriers and not entirely within the limits of a single State, thus excluding intra-

81 state traffic, we shall have jurisdiction of the transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the particulars specified. The condition or limitation that the transportation shall not *be* entirely within the limits of a single State therefore applies as well to an order requiring a carrier, by rail or by water as the case may be, to perform the service of operating the connecting tracks, and prescribing the terms and conditions thereof, as to an order establishing through routes, joint rates, or rail-line proportional rates. In the order here made the applicability of this limitation is apparently recognized, although imperfectly, in the stipulation that the prescribed services shall embrace both interstate and intrastate traffic. The intrastate feature should be omitted, because our jurisdiction is limited to transportation not entirely within the limits of a single State, and our order should observe the limitation.

The "terms and conditions" to be determined and prescribed must take into account the governing limitation and confine the order to transportation not entirely within the limits of a single State. Aside from the practical difficulties which would attend an effort to limit such an order by means of anything like mere policing regulations, the meaning of the limiting provision must be considered. It is a question of the scope of our jurisdiction. It is true that the State courts had before them an order of the State commission, in terms limited to intrastate traffic, which not only required defendant to perform a particular operating service upon the terminal tracks but also required it to file tariffs covering the service into and out of the terminal and over its connecting lines. It is also true that, with such an order before them, those courts, while expressly recognizing the State statute as in itself a valid exercise of regulatory 82 authority, held that the Federal exertion of like authority covered the entire field and superseded the State authority. That conclusion was based upon cited decisions of the Supreme Court of the United States which uphold the paramount rights of interstate commerce and the supremacy of Congress in the regulation of that commerce.

But no decision of that court goes so far as to recognize an extension of our jurisdiction, in any such case as this, to the regulation in any manner of intrastate commerce. In the recent case of Railroad Commission v. Southern Pacific Co., 264 U. S. 331, the court held that exclusive power to require construction of a union passenger station and terminals is now vested in us, at the same time ap-

parently conceding that a State's police power in related matters, not involving main-line extensions or substantial capital outlays, might still be exercised. There, certainly, the State's reserved regulatory jurisdiction would not be impaired. Here, the construction and connection have been made. Transportation is the movement of traffic, for which track construction and connection merely pave the way and provide the means. Traffic not moving "entirely within the limits of a single State" is of course not intrastate. Paragraph 13 of section 6, as part of the interstate commerce act, is to be construed in *pari materia*. Unless the language of the particular limitation or the context compels a different interpretation, and clearly it does not, this paragraph should be interpreted to harmonize with the general limitation upon our authority which the act otherwise provides. In this view, our jurisdiction does not extend to the regulation of intrastate commerce.

The foregoing differentiation has a twofold significance: 83 First, that we could not competently undertake, directly or indirectly, any regulation of such intrastate commerce as might be handled over a through rail-and-water route via the Erie Basin terminal; and second, that the confinement of an exercise of regulatory authority on our part within its proper bounds, in this case to intrastate commerce, can be assured only by the usual differentiating means, the establishment of appropriate rates. The latter consideration is strengthened by the mandate in paragraph (1) of the same section 6 already quoted. The defendant is subject to that mandate. What our order requires it can not do without publishing and maintaining rates and charges applicable to the property so transported in the interstate commerce. Complainants say that this is in no sense a rate case. But tariff publication of the rate or charge for the service is an indispensable prerequisite to the rendering of the service, and the record affords insufficient basis for determining what that rate or charge should be.

It is not in keeping with either the letter or the spirit of the statute to undertake to impose a burden upon the defendant rail line alone. The way is open to the State of New York to bring before us the necessary parties and secure the exercise of our administrative judgment upon the merits as distinguished from questions of jurisdiction.

The manifest importance of this case, both in itself and as a precedent, and my conviction that the conclusions and order of the majority are irreconcilable with the statutory provisions upon which they purport to rest, have prompted this expression of dissent; and I am authorized to state that Commissioner POTTER concurs herein.

84 In United States District Court

[Title omitted.]

Answer of the United States

Filed May 4, 1925

United States of America, respondent, by its counsel, now comes and for answer to the petition filed herein against it, says:

I, II, III. On information and belief respondent admits the facts alleged in paragraphs I, II, and III in manner and form as alleged.

IV, V. On information and belief respondent admits that on or about March 22, 1923, the State of New York and its superintendent of public works filed the petition or complaint before the Interstate Commerce Commission, and that, subject to verification, a true copy is attached to the petition as Exhibit B; but respondent alleges that Exhibit B does not set forth the full scope of the complaint before the commission as it was amended and enlarged subsequent to the filing thereof; for the substance of the amendments, for the issues presented by Exhibit B as amended, and for the substance of the interventions of other parties complainant, respondent refers to the report of the commission and alleges that the latter sets forth the full scope of the complaint before the commission.

85 VI. Respondent has no knowledge of the matters and things alleged in Paragraph VI, it neither admits nor denies the same, and in so far as they may become material upon the hearing it will require strict proof thereof. Respondent alleges that if the petitioner filed before the Interstate Commerce Commission the answer referred to, obviously Paragraph VI contains but mere fragments or excerpts therefrom and not the entire contents of the answer. Respondent alleges that the parties before the commission and the issues determined between and among them are fully set forth in the report of the commission to which this respondent refers in its entirety and a copy of which is attached to the petition as Exhibit C.

VII, VIII. Respondent has no knowledge of the matters and things alleged in Paragraphs VII and VIII, it neither admits nor denies the same, and in so far as they may become material upon the hearing it will require strict proof thereof.

IX. On information and belief respondent admits that the commission made and entered the order set forth in Paragraph IX and, subject to verification, a true copy thereof is attached to the petition as Exhibit C.

X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XI, XXII, XXIII, XXIV. On information and belief respondent denies the matters and things alleged in Paragraphs X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII,

XXIII, and XXIV and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

XXV. On information and belief respondent denies the matters and things alleged in Paragraph XXV and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby, with this exception; respondent admits, subject to verifications, that the laws of 1911 of the State of New York and particularly the provisions of chapter 746 contain the sections referred to and that, subject to verification, a true copy thereof is set forth in the petition.

XXVI. On information and belief respondent denies the matters and things alleged in Paragraph XXVI, and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby, with this exception: Respondent admits that if the order is not enjoined and set aside petitioner will be required to accept for transportation to and delivery at Erie Basin barge canal terminal freight consigned to points reached by the lines of petitioner which otherwise would be transported to the same points by petitioner and for the transportation of which petitioner would receive rates and charges according to published tariffs.

XXVII. On information and belief respondent denies the matters and things alleged in Paragraph XXVII, and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby, with this exception: Respondent admits that if the order is not enjoined and set aside and petitioner fails to comply therewith it will be subjected to liability for penalties for violation thereof.

Further answering, respondent alleges that the matters and things set forth in the petition and sought to be put in issue before the court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the interstate commerce act; in its report in writing with respect thereto, made after full hearing and on due notice to all of the parties, which state its conclusions together with its decision, order or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence before the commission of which the parties were advised.

87 Respondent alleges that the facts set forth in the report of the commission and each and all of the same are true and correct.

Respondent specifically denies—

(a) Any fact or facts alleged in the petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the commission.

(b) Any fact or facts alleged in the petition, or any part of the same, which are inconsistent with any fact or facts found by the commission.

(c) Any and all inferences of fact from any particular fact or facts alleged in the petition, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the commission.

(d) Any fact or facts alleged in the petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the commission.

(e) Any fact or facts alleged in the petition, or any part of the same which attack or which seek to attack the action of the commission, and to show facts other than what the commission has found and declared.

(f) Any allegations in the petition, or any part of the same which allege that facts were found by the commission in its report and order which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the petition, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

(h) Each and every allegation in the petition contained not herein specifically admitted or denied.

88 Wherefore, having fully answered, respondent prays that the petition be dismissed at the cost of the petitioner and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OLIVER D. BURDEN.
United States Attorney.

89 [*Duly sworn to by Blackburn Esterline; jurat omitted in printing.*]

[File endorsement omitted.]

90 In United States District Court

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed May 4, 1925

To the Honorable the Judges of Said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, I hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of myself as its counsel, in the above-entitled suit.

P. J. FARRELL.

[File endorsement omitted.]

[Title omitted.]

Answer of Interstate Commerce Commission

Filed May 6, 1925

The Interstate Commerce Commission, intervening respondent in the above-entitled suit, hereinafter called the commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraphs I and II of the petition, the commission admits, for the purposes of this suit, that the allegations therein contained are true.

II

Answering Paragraphs III, IV, and V of the petition, the commission admits that the order petitioner is asking the court to enjoin and set aside was made upon a petition filed in the commission's office by the State of New York and Edward S. Walsh, superintendent of public works of said State; that the capital, the official residence of the governor, the seat of the legislature, and the official residence of the superintendent of public works, of said State, is Albany, and that said petition was filed as aforesaid on March 22, 1923; but, for information concerning the allegations contained in said petition and the purport of the allegations the commission refers the court to said petition, a copy of which is attached to the petition herein and marked "Exhibit B."

III

Answering Paragraph VI of the petition, the commission admits that petitioner filed in the commission's office an answer to the aforesaid petition of the State of New York and the superintendent of public works of that State, and that allegations contained in the answer were in part substantially as set forth in said Paragraph VI.

IV

Answering Paragraphs VII to XXVIII, inclusive, of the petition, the commission admits and alleges that it made and entered, and served upon petitioner and other interested parties, the order dated

December 9, 1924, and referred to in Paragraph IX, in the proceeding instituted before it as aforesaid, and that a true copy of the order of December 9, 1924, is set forth in said Paragraph IX.

The commission further alleges that, prior to the making, entering, and serving of said order as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of the interstate commerce act; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the commission for determination, on behalf of said parties by their respective counsel, whereupon the commission determined said matters and made and entered, and served upon all the parties to said proceeding, including the petitioner herein, a report which is referred to in and made a part of said order, which report included the commission's findings of fact, decisions, conclusions, orders, and requirements in the premises.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the allegations of the petition herein.

The commission further alleges that said order of December 9 was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said petition.

The commission particularly denies that, as alleged in Paragraph XVII of the petition, it did not prescribe the terms and conditions under which the connecting tracks covered by said order of December 9, 1924, are to be operated by petitioner; denies that, as alleged in Paragraphs VIII and XVIII of the petition, there was no competent evidence in the record made before the commission in said proceeding upon which such terms and conditions could be fixed or determined; and denies that, as alleged in Paragraph XXVIII of the petition, petitioner will suffer irreparable damage if said order of December 9, 1924, is not stayed and enjoined.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report, which report is hereby referred to and made a part hereof.

The commission alleges that "Division 4," mentioned in said Paragraph VIII, should be "Division 1."

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL, *Chief Counsel*.

[*Duly sworn to by Charles C. McChord; jurat omitted in printing.*]

94

In United States district court

[Title omitted.]

Order to transmit certain papers

Filed December 21, 1925

For good cause shown, it is ordered that the within stipulation and documents attached to and accompanying the same shall be filed in the above-entitled cause and shall be by the clerk of this court transmitted to the Supreme Court of the United States as a part of the transcript of the record on the appeal in lieu of the certified full copy of the transcript of the evidence and proceedings before the Interstate Commerce Commission.

FRANK COOPER,
United States District Judge.

[File indorsement omitted.]

95

In United States district court

[Title omitted.]

Stipulation re statement of evidence

Filed December 21, 1925

A certified full copy of the transcript of the evidence and proceedings before the Interstate Commerce Commission in the State of New York et al. v. The New York Central Railroad Company, Docket No. 14777, on the docket of the commission, having been offered in evidence in this suit, the parties by their respective counsel, for the purpose of reducing the record on appeal, stipulate that in lieu thereof there shall be filed in the above-entitled cause and transmitted by the clerk of this court to the Supreme Court of the United States, as a part of the transcript of the record on appeal, the attached documents which the parties stipulate to be copies of

all of the documents comprised in said certified full copy of the transcript of the evidence and proceedings before the commission, except (1) that in lieu of the official typewritten minutes of the hearings held by the commission there has been substituted a transcript in narrative form which the parties stipulate is a true and correct transcript in narrative form of all of the hearings held before the Interstate Commerce Commission, and except (2) that in lieu of Exhibit No. 4 in the transcript of the proceedings before the commission which consisted of a copy of the testimony taken in the proceedings before the Public Service Commission of the State of New York, there has been substituted a transcript in narrative form of such testimony which the parties stipulate is a true and correct transcript in narrative form of all of the testimony before the Public Service Commission of the State of New York set forth in said Exhibit No. 4.

PARKER MCCOLLESTER,

Solicitor for Petitioner.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

[File indorsement omitted.]

[Report of I. C. C. omitted, see Exhibit C. Printed side page 36 ante.]

125

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of December, A. D. 1924

No. 14777

THE STATE OF NEW YORK AND EDWARD S. WALSH, SUPERINTENDENT
OF PUBLIC WORKS OF THE STATE OF NEW YORK

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual

tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the city of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

It is further ordered, That said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom.

And it is further ordered, That this order shall continue in force and effect until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

A true copy:

GEORGE B. MCGINTY,
Secretary.

126 Before the Interstate Commerce Commission

THE STATE OF NEW YORK AND EDWARD S. WALSH,
Superintendent of Public Works, com-
plainant

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
defendant

} Docket No. 14777

BUFFALO, N. Y., June 15, 1923.

Before examiner J. C. DONNALLY:

1

Statement of evidence filed in D. C. U. S.

Dec. 21, 1925

[Appearances of counsel omitted in printing.]

[File endorsement omitted.]

At the outset, defendant moved for dismissal of the petition, on the ground it attempted to proceed under section 6, paragraph 13, of transportation act, 1920, which covers only an application as between rail carriers and water carriers; alleging, further, that the State is neither a rail carrier nor a water carrier, nor is there any water carrier combined with the State in this application. Defendant contended the petition failed to state a cause for action that would bear a hearing or bear a decision, and that there was no proper party joined in the proceeding.

The examiner stated the motion would be noted in the record.

Counsel for the State of New York stated that their general claim was that the State, through its constitutional officer, the superintendent of public works, is furnishing a common-carrier service, viz, the barge-canal terminals and all facilities for common carriage, adding that he thought that that alone would give it a standing in court. As a second ground of jurisdiction, counsel for the State contended that the superintendent of public works appeared here on behalf of all the citizens of the State and all common carriers and all shippers and all persons desiring to use this facility in the State of New York. As a third ground of jurisdiction, counsel stated: "I beg leave to have noted the appearance of the Rochester Terminal and Canal Corporation, a common carrier on canals, by R. W. Davis, its president, who begs leave to intervene."

Counsel for the defendant objected to that because "he can not intervene at this time. He is not a party to the petition."

The examiner ruled that petitions of intervention would be received by the examiner and that any exceptions taken to his action were noted in the record.

Counsel for carrier alleged to do so would broaden the issue.

The examiner stated that they did not know whether matter was to be presented which would broaden the issue or not and that the intervenors had a right to present petitions to intervene in a cause before the Interstate Commerce Commission. The examiner further stated that the hearing would proceed on the assumption that there is a proper issue before the commission.

Counsel for the carrier also took exception to the statement of counsel that the State is a common carrier and that the superintendent of public works had a right to represent carriers in the State, adding: "He may represent the State as such, but we contend that he has no right to represent any carrier."

Counsel for the State said that he desired to name another corporation which desired to intervene at this hearing, stating further that these petitions of intervention would be filed "in due form."

Carrier's counsel stated that if the State has no standing in the proceeding any petition filed by anybody else would really be in a de novo proceeding, and if it would broaden the issue, that they

would be entitled to the usual time to answer their petition. The examiner then stated that if the intervening petitions presented matter which broadened the issues then would be the time to consider that question.

Counsel for the carrier then inquired: "Is it not your view
128 that if there is now no common-carrier complainant in this case and common carriers intervene that that presents an entirely new issue and therefore broadens the issue of the original complaint?" To which the examiner replied: "It depends upon the matter presented in the petition."

Counsel for the State added that the petition of intervention, as he apprehended it, would not broaden the prayer for relief.

The examiner stated: "The complainant has a pretty wide field of proof; he probably can prove under the prayer anything that any other person or party could prove under a like prayer."

Counsel for the State also said he desired to present a petition on behalf of the Interwaterways Line, Inc., by G. Roy Hall, secretary and general manager, for leave to intervene as a party complainant; also that the Buffalo Chamber of Commerce sought leave to intervene by Frank E. Williamson, its traffic commissioner. He added that the status of these parties would not be that of new parties complainant, but that of intervenors.

Counsel for the carrier made the same objection to these last-mentioned parties that they raised with reference to the Rochester application, and the examiner ruled that the objection would be noted.

Counsel for State withdrew motion to intervene on behalf of the Buffalo Chamber of Commerce. (Tes. 4-9.)

Mr. J. W. GRADY was called as a witness, and, being duly sworn, testified as follows:

Direct examination:

I am assistant deputy superintendent of public works of the State of New York, and have been since the first of this year. I was in the employ of the superintendent of public works during the time there was pending before the Public Service Commission of the State of New York this same matter. I have familiarized
129 myself with the canal situation of the State of New York, particularly in its relation to the Erie Basin terminal in Buffalo.

The State of New York, through its State engineer, the superintendent of public works, and the canal board, under the provisions of the barge and canal act, chapter 147 of the Laws of 1903, has constructed a terminal at Erie Basin, city of Buffalo, at the foot of Genessee Street, comprising two piers, whereon have been constructed warehouses, mechanical appliances for the receipt and delivery of canal-borne and rail-borne traffic. These piers that I speak of could properly be denominated as docks. I am familiar

with traffic on the Great Lakes and on canals, and I know a dock and a pier when I see them. Under the provisions of the terminal act of the State of New York the superintendent has caused to be constructed between the Erie Basin terminal and the line of the New York Central Railroad a physical connection. These connections now exist. (Tes. 9-11.)

130 The Erie Basin terminal, through the medium of the Niagara River, the entrance of Tonowanda Creek at Tonawanda, is accessible to the barge canal system of the State of New York, thence to tidewater at Troy, on the Hudson River, and other tributaries of the canal system. I am unable to say what the cost of this construction of the barge canal terminal was, but it is my understanding that it was in the neighborhood of two million dollars. The canal channel has a maximum bottom width of 125 feet, and a minimum bottom width of 75 feet. The depth of the channel is 12 feet, depth of water on lock cells; the size of the lock will accommodate a barge or vessel of other type and not exceeding 300 feet in length, 44 feet in beam, and the draft meeting conditions of the channel as they vary from time to time, of a maximum, say, 11 feet; and the overhead clearance of the canal is 15 feet, thus restricting vessels which ply it, to free board above the water line of—I should have said 15½ feet—to a free board of that weight. There are
131 vessels plying the canals which have loaded a maximum draft of water, say, for a cargo capacity of approximately 1,800 tons.

The type of craft navigating the canals varies as to dimensions and character. Many are of steel, self propelled; others are of wood, not propelled, and wood propelled. In all, it is estimated that there are approximately 600 odd cargo carriers of different types actively engaged in canal commerce at this time.

The canal actually opened for navigation this year on May 7. The season of navigation may be measured on the average from the first of May until the first of December. There have been instances in recent years, however, when the waterway became navigable as early as April 25th, and remained navigable as late as December 24. (Tes. 11-13.)

The canal at the present time is being operated throughout its entire length. The eastern terminii of the canal is at Waterford, a point 6 miles northerly of Troy on the Hudson River. The system comprises 4 divisions, the main line, or the Erie, extending from
132 Waterford to the confluence of Tonowanda Creek with the Niagara River, a distance of 352 miles. Northerly from Waterford, through the canalized channel of the upper Hudson, it extends a distance of 63 miles to Whitehall, at the southerly extremity of Lake Champlain, at a point approximately 12 miles north of Syracuse, at the confluence of the Oneida, Oswego, and Seneca Rivers. The Oswego division operates northerly to Lake Ontario, a distance of some 53 miles. At a point approximately 43 miles west of Syracuse, at what is known as Montezuma Junction, the

Seneca division branches in a southerly direction, connecting the main channel with Lakes Cayuga and Seneca, thence through those lakes a distance of about 40 miles, to the southern-most terminal at East Lake of Ithaca and Watkins. Included in the canal system, there are elaborate terminals built by the State in the Harbor of New York and those at Buffalo. The total investment of the State in its waterway enterprise to-day is measured at \$171,000,000, including the cost of terminals. The initial referendum for terminals was \$91,000,000; subsequently this was added to, to the extent of the cost of grain elevators in Brooklyn, approximately two and a half million dollars, and various and extended improvements, which brings the terminal improvement up to in the neighborhood of \$25,000,000. (Tes. 13-14.)

In answer to your question as to how many terminals there are on the barge canal, I would offer this map, which indicates thereon by a symbol, the location of the terminals throughout the entire waterway system.

(The map in question was thereupon received in evidence, marked "Complainant's Exhibit No. 1, Witness Grady.") (Tes. 15.)

Where facilities exist, the railroads of the State and within the State are interchanging traffic generally with the barge canal terminals. I am able to state from reports filed by our department what the tonnage of the barge canal at Buffalo has been for last year, but not for this year. It has not been brought up to date for this year.

I am reading from the annual report of the superintendent of public works for the year 1922, containing the statistical record of canal commerce for the season of navigation. (Tes. 15-16.)

The record, as compiled, shows traffic received and forwarded at the port of Buffalo, classified as Buffalo and Buffalo local, the former being the tonnage which does not originate locally within the city of Buffalo; the forwarded tonnage from Buffalo for the season of 1922 was 657,921 tons. That in respect to Buffalo local traffic was 38,451 tons. The tonnage received at the port of Buffalo, classified in the same manner, was 444,588 tons and 38,551 tons. I mean received at the port by barge canal; in other words delivered by the barge canal at Buffalo. The sheet you show me has a comparative statement of tonnage for the season of 1923, as far as it has gone. This record covers the season of navigation, to the week ending June 9, 1923. (Tes. 17-18.)

(The statement was thereupon received in evidence, marked "Complainant's Exhibit No. 2, Witness Grady.")

I am able to state the principal common carriers operating between the barge canal at the present time, and using the Buffalo terminal. In answer to that, I offer General Circular No. 18, issued by the superintendent of public works as of May 10, 1923, which identifies the common carrying interests on the waterways.

(The document was thereupon received in evidence, marked "Complainant's Exhibit No. 3, Witness Grady.")

I am able to identify, at pages 50 to 268 of the book you show me, minutes of the hearing held before the Public Service Commission of the State of New York, in the matter of the complaint of Edward S. Walsh, as superintendent of public works, in this same matter.

(The book was thereupon received in evidence, marked "Complainant's Exhibit No. 4, Witness Grady.") (Tes. 18-20.)

Cross-examination:

I have made some study of the operation, the cost of operation of the barge canal. I do not know that over 10 million dollars of the tax payers' money was used in the year 1921 to effect a possible saving of about \$1,450,802; or in other words, that about $7\frac{1}{2}$ million dollars were lost to the tax payers of the State by the operation of this canal. I would have to determine the source of the 10 million dollar figure first before I would say it was true.

134 As to what I would say as to whether or not the figures of the year 1922 show that over \$11,500,000 of taxpayers' money was used in the barge canal to effect a possible saving of \$2,260,763: I know of no standard that may be employed in determining what the saving may have been on the canal. (Tes. 20-22.)

Redirect examination:

The State furnishes towing service upon Oneida Lake. Due to the hazardous conditions of navigation there, and serious loss of life and property that resulted from sudden storms in two instances last summer, the State has adopted the policy of providing salvage and wrecking tugs on the body of water. They are there purely to give assistance in times of distress, and in the event of the rising of storms. Oneida Lake is part of the canal system. (Tes. 22.)

Cross-examination:

I gave a figure of 657,921 tons of freight forwarded by canal from Buffalo, which did not originate locally. That is freight that came from other points than Buffalo; it is what is meant largely as ex-lake freight. I can give you the actual grain figure. Pages 147 to 152 of the 1922 report show wheat, 335,663; corn, 70,181; oats, 15,146; rice, 74,331; barley, 55,210. All of that was ex-lake, practically. I said delivered to the canal directly by the steamship companies through the elevators. The total for grain was about 550,000 tons. As to what the other 100,000 tons consisted of: The detailed record shows, iron, 26,040; iron and steel articles, 38,205; petroleum and petroleum products, 23,001; implements, vehicles, etc., 72 tons; oil, meal and cake, 2,541; fertilizer, 400. To a very great extent those commodities were ex-lake also. The grain was both domestic and export. I don't know in what proportion. The records of the New York Produce Exchange will show that—as to what portion of canal-borne grain reaching the port of New York was export. It is quite a large proportion; there is only one consumer in New York that takes canal-borne grain, domestic.

"Q. So that practically all of this grain originated outside of the State of New York and passed through to some purchaser
135 outside of the State of New York?

"A. The purchaser may have been, yes, sir; or on the other hand——" (Tes. 22-24.)

As to the other commodities that I read, they were not largely export. The iron to a great extent is export, and the ore is export. I would say the balance of it was largely domestic, with the destination New York and intermediate ports scattered all through. It would take some time to determine how it was distributed.

All the figures I gave were tons, short tons. (Tes. 24-25.)

Redirect examination:

As to the portion of State as compared with interstate commerce upon the barge canal: The interstate commerce is overwhelmingly in the majority; it might be approximated at 75% interstate and 25% intrastate. Our largest item of interstate traffic is ex-lake grain, which has both Canadian and domestic origin at the head of
136 the Lakes. There is interstate commerce passing over the canal and out of the State by the port of Buffalo. There has been considerable activity in certain commodities out of the port of New York to Canadian ports, through the gateways of Oswego to Lake Ontario and Buffalo. (Tes. 25-26.)

(Witness excused.)

Mr. LEROY C. HULBURD was called as a witness and, being duly sworn, testified as follows:

Direct examination:

I am senior assistant engineer in the State engineer's department, stationed at Buffalo. I was educated in the high school at Brassher, N. Y., took a course in civil engineering at Norwich University, Vermont, and graduated as civil engineer. I have been employed since 1894 in engineering work; about 4 years on fire-insurance inspections; 7 years on hydraulic power construction; 18 years with the State of New York, principally on barge-canal construction and terminals, and some experience in highways.

At the present time I am in general charge of barge canal and terminal construction work in the vicinity of Buffalo, and extending easterly to Holly along the canal. Previous to the 1st of
137 January I was division engineer in charge of all canal work on the western division of the State, extending from Savannah to Buffalo. I made it a point some 2 months ago to familiarize myself with the minutes shown by Exhibit 4, the hearing before the State Public Service Commission, when this same matter was up. I examined the exhibits that were introduced in evidence in that case. The blue print you show me is a print of the official blue-line maps, as approved by the canal board on December 28, 1922, showing State canal lines in the vicinity of the Erie Basin; also showing railroad tracks and buildings, not only on State land but on adja-

cent land. This was approved by the canal board on December 28, 1922. This map indicates the degree of curvature of the tracks going into the barge canal terminal and into property adjacent to the barge canal terminal. We brought this plan or blue print up to date from the exhibits that were offered in evidence in the Public Service Commission case. That has been completed to December, 1922. The copy I have here has not that pencil information on it.

The construction which has been carried on since the maps
138 and plans were offered in evidence in the Public Service Commission case have been added to the map. The railroad lines shown on the other map have not been changed, but additional tracks on State property have been added. They are not indicated in any way on the map as new tracks. I can indicate on that plan the new construction. The State has constructed one additional track on the west side of the terminal warehouse, indicated by the black line on the map. This indicates when these were built. The State has also constructed a car-storage yard shown on the map in blue. Those are the only changes in track construction since the original map was submitted; that is the line next to the New York Central right of way. (Tes. 26-29.)

The new construction that I refer to is on Pier No. 1—the track which is in the warehouse; the storage track is between Piers 1 and 2, slightly inward.

(The map was thereupon received in evidence, marked "Complainant's Exhibit No. 5, Witness Hulburd.") (Tes. 30.)

There is nothing indicated on this exhibit not shown on the
139 map entitled, "Terminal Contract No. 61, Erie Basin, Buffalo," which in the Public Service Commission case was our Exhibit No. 1, being a general lay-out plan, dated March 12, 1918.

(Exhibit withdrawn because Exhibit No. 5 contains everything in it.) (Tes. 30-31.)

The photograph you show me marked "Erie Basin Terminal Warehouse from P. & R. coal trestle, dated June 14, 1923," shows the P. & R. coal trestle indicated upon Exhibit 5, and it properly represents what it purports to show.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 6, Witness Hulburd.")

The photograph you show me shows the Grand Trunk tracks to exchange elevator. That is indicated upon Exhibit 5. The photograph is dated June 14, 1923, and shows correctly what it purports to show.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 7, Witness Hulburd.") (Tes. 31-32.)

The photograph you show me dated June 14, 1923, showing
140 the New York Central tracks to Thornton and Chestnut flour mill, has the notation on Exhibit 5, but not the name of the property. On Exhibit 5 it is shown on the southerly side of Erie Street and west of Evans Slip. The photograph properly shows what it purports to show.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 8, Witness Hulburd.") (Tes. 32.)

The photograph you now show me dated June 14, 1923, New York Central freight house, north side of Coit Slip, is shown on Exhibit 5. The photograph properly shows what it purports to show.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 9, Witness Hulburd.") (Tes. 32.)

As to the series of photographs you now show me, purporting to show junction of the New York Central and Erie Basin tracks, dated December 29, 1919, there has been no material change since that photograph was taken in the locality shown.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 10, Witness Hulburd.") (Tes. 33.)

141 In the photograph you show me of the Erie Basin terminal track, looking southeast, dated December 29, 1919, the storage tracks have been constructed since that time. I refer to the two storage tracks, and the warehouse has been completed, and temporary buildings around the warehouse have been removed.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 11, Witness Hulburd.") (Tes. 33.)

There are two photographs here that went in the Public Service Commission case that are not in now. The situation shown in photograph entitled, "Looking north along shore of Erie Basin, December 29, 1919," has not changed any since that time. It was offered in evidence in the Public Service Commission case.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 12, Witness Hulburd.") (Tes. 34.)

In the photograph entitled, "Tracks at P. & R. coal trestle, looking north," December 29, 1919, offered in evidence in the Public Service Commission case, I could not certify as to whether there was any change there. There might be a little change

142 in the construction of the elevator there, in the trestle bracing, or something of that kind. It is substantially accurate; I think they did a little rebuilding there.

(The photograph was thereupon received in evidence, marked "Complainant's Exhibit No. 13, Witness Hulburd.") (Tes. 34-35.) (Witness excused.)

143

Colloquy between examiner and counsel

Mr. GRIFFIN (for the State). "If the examiner please, as the case has gone along, some discussion has arisen as to the meaning of my motion for intervention at the beginning of the case. In order that all doubt as to my purpose may now be removed, the Rochester Terminal and Canal Corporation, and the Interwaterways Line, Incorporated, common carriers, operating upon the barge canal, and the Corrugated Bar Company, by Charles E. Spangenberg, its traffic

manager, an industry in the switching district of Buffalo, desire leave, first, to intervene under form No. 3, as shown in the approved forms of the commission, contained in their printed rules of practice. * * *. Secondly, all of these parties move to join as parties complainant, and to be given the relief demanded on their behalf as stated in the prayer for relief in the amended complaint filed previously with the commission.

"Further, in connection with that motion, I desire to state that the complaint as drawn and presented to the commission, comprehended an interchange of traffic with all lines reaching the barge canal terminal, and with that purpose in view, as broadly as we can use the case in the State courts, I shall argue upon that theory that this was an interchange case. If there is any doubt about the meaning of our purpose in the examiner's mind, from reading that prayer for relief now contained in the complaint, we desire to amend it to provide definitely that an interchange of traffic shall be provided between all lines in the State of New York or outside, even, that can possibly reach the Erie Basin barge canal terminal over the railroad line of the defendant, New York Central Railroad Company."

The examiner ruled that the complaint would be amended by the addition of the three parties named, and that the prayer in the complaint would be amended to cover the request for the interchange of traffic mentioned in the remarks of counsel for the complainant. An exception was taken to the ruling by counsel for the carrier.

Mr. GRIFFIN. "I now offer a petition, dated June 15, 1923, signed by the Rochester Terminal and Canal Corporation, and the Inter-waterways Line, Incorporated."

Mr. SPRATT (for the carrier). "We object to that as inopportune, and too late; and also that it broadens the issue in this matter."

The examiner overruled the objection.

Mr. SPRATT (for the carrier). "We are not ready to proceed, and can not proceed. We are entitled to time to answer, and to prepare our defense in this case."

The EXAMINER. "The objection will be overruled. The petition will be received."

Mr. SPRATT. "Exception. We also ask here that none of the testimony so far taken shall be applied in any way to these parties who have intervened to their case; that it be applied solely to the petitioner, the State of New York, and we object to it being used for any other purpose, or to benefit any other petitioner."

The examiner said that the motion would be noted.

144 The EXAMINER. "I understand, in substance, that the complainant asks that the New York Central be required to move cars containing traffic inbound to the canal terminal, to the pier and wharf or other proper unloading place, provided by the terminal company; that it be required to set cars at the pier and wharf, or other loading place provided by the terminal company, for outbound

traffic from the canal; and to provide motive power to move those cars out; that it establish a switching charge or switching charges covering movements from the terminal and to the terminal within the switching district of Buffalo; and that it publish proportional rates on traffic from other points in New York and to other points in New York to and from the terminal. Is that it?"

Mr. GRIFFIN. "I think you have precisely stated it, your honor. On that question this morning that arose with regard to whether this was a case for interchange of traffic, it will be noted in the first paragraph of the prayer for relief that we ask that they move all cars to any railroad company with which the New York Central Company can interchange traffic."

The EXAMINER. "You are not asking for the establishment of through routes and joint rates?"

Mr. GRIFFIN. "Not joint rates. We have no rates to make. Through routes and joint rates are not asked for at this time, but it may be that that will develop after."

Mr. MCCOLESTER (for the carrier). "That the record may be clear, Mr. Examiner, I think I should say with reference to your statement of issues, as you understand them, that I can find in the complaint as filed no request that rates to and from points within Buffalo be published as a switching rate, or that the rates to and from other points in the State of New York be published as proportional rates. The only reference in the complaint to rates is contained in paragraph 3 of the prayer and simply is to the effect that the defendant shall establish proper rates for such service. That certainly is not a prayer for the establishment of switching rates or proportional rates."

The EXAMINER. "Your remarks will be noted in the record."

Counsel for the State then asked leave to amend, to which carrier's counsel objected.

The EXAMINER. "The examiner does not think that an amendment is necessary in order to open the way for such relief as has been discussed; but if the complainant desires to amend his complaint so that it will expressly ask for the establishment of switching charges in the cases indicated, and for the establishment of proportional rates in the case indicated, the amendment will be permitted."

Mr. SPRATT. "Exception." (Tes. 35-42.)

145 Mr. CHARLES E. SPANGENBERG was thereupon called as a witness, and having been first duly sworn, testified as follows:

Direct examination:

I am traffic manager of the Corrugated Bar Company (Inc.), with our plant located at Lackawanna, N. Y., on the South Buffalo Railway, within the Buffalo switching district, and approximately 6 miles from the barge canal terminal. Our company fabricates and distributes steel bars for the building of bridges, highways, and

buildings. No testimony was offered on behalf of our company at the hearing before the State Public Service Commission.

As to the experience we have had in attempting to use the Erie Basin barge canal terminal: Our plant is located, as stated, 146 at Lackawanna, N. Y. Our main competitors are the Bethlehem Steel Company and the Donner Steel Company. Both of these firms have facilities for loading on to barges directly from their docks. We have been practically unable to secure any business within New York lighterage limits, where it was possible to make barge canal delivery. In the case of the New Market of Newark, N. J., our company were the engineers and designed all of the improvements with the understanding that we were to secure the contract for the steel providing that the price would equal or be less than that of our competitors. The result was that the Donner Steel Company secured this contract, which involved approximately 2,000 tons, as I recall it. In another case we secured the contract for the furnishing of the steel in the city of Rochester, for the closing up of the old barge canal terminal, which required a great deal of reconstruction. Scott Brothers had the contract, and they desired delivery along the barge canal at Rochester. The result was that they were put to the expense of trucking the material from the Lehigh Valley and the B. R. & P. stations to this new work, 147 which the State and the city of Rochester ultimately had to pay for, in addition to the regular contract. Now our company does approximately 10,000 tons worth of business in New York City, and we feel that it should be approximately 20,000 tons, providing we had the proper barge facilities. (Tes. 42-44.)

Our profit under ordinary conditions is from 50 cents to \$3.00 a ton. The freight amounts to approximately 25% of the value of the material. Therefore our business would amount to approximately 20,000 tons for this reason—20,000 tons instead of 10,000 tons—we keep a very careful record of the contracts that we lose in the city of New York, and we find that part of our loss is, or practically all the loss is occasioned by the higher freight rates. Under existing conditions Belgium ships into New York steel for approximately \$4.00 per ton. Taking the other features into consideration, we thought that we lost about 6,000 tons of this business for which we did the engineering in New York City, but we could not sell the steel; and about 4,000 tons of this was lost to our competitors 148 for this reason. There are a number of new steel plants going up. I have a record of where they are and the rates which are applicable. There are two plants being built, which are Rarriton —.

I am trying to prove in this connection what we have lost by reason of the lower freight rate. We are able to secure, by use of the barge canal, even the present rate of \$3.00 per ton would enable us to get into New York, whereas at the present time we are not able to do it, with the exorbitant price of \$6.30, which it is necessary to pay on straight material at the present time. I wanted to place in the record that we are located on the South Buffalo Railroad and

for about 6 months of the year we were embargoed. We were able to move some of this material by getting special permits. If the commission would require the New York Central to make a connection so that this overflow would go to the barge canal, we would be able to get into New York, whereas under conditions existing when embargoes are in effect, we are not able to do it. To make myself clear, the South Buffalo Railroad is only a switching
149 line, and every other railroad with one exception—it seems that every time a general embargo goes into effect, they tell us that they are able to take the business from their own industries on their own line, but on account of embargoes east of Buffalo, they are not able to take it. Now, then, if we can move this stuff by barge canal, they would not have a logical reason for refusing our shipments. That is another pertinent reason for our request that that be granted. (Tes. 44-46.)

I could mention several other points, but I do not want to fill up the record, where this competition takes place, but I can furnish evidence to substantiate that claim if it is necessary. There are 7 or 8 railroads operating in Buffalo; the New York Central; the Buffalo, Rochester & Pittsburgh; Delaware, Lackawanna & Western; Lehigh Valley; Erie Railroad; Pennsylvania Railroad; Buffalo Creek Railroad; South Buffalo Railroad. There are also the New York, Chicago & St. Louis; Grand Trunk; Wabash; and Pere Marquette; I had reference to the eastbound. I am quite sure it is possible physically for the New York Central to interchange traffic
150 with all those roads; they have a belt line around Buffalo. I would say yes, I know they can. (Tes. 46-47.)

Cross-examination:

I mean they can interchange either directly or through another line. The South Buffalo connects with all eastbound. Supposing I wanted to make a shipment to this canal terminal, as to what different roads would it have to go through from our plant: The South Buffalo and New York Central, which connect at West Seneca. I do not know that the other railroads make connection with the barge canal. The South Buffalo connects with the Buffalo Creek, the Erie, and the Lackawanna. I made the inquiry from George Bowman, assistant general freight agent of the B. R. & P., and that official told me they were not making a connection with the barge canal terminal.

“Q. Is that all you know about the situation here as to what has been done with the canal terminals?”

“A. Well, I understand, of course, that they have facilities for delivering to the canal grain products and iron and steel products. We made inquiry from practically every railroad in
151 Buffalo as to whether they were able to do that, and I know that they can not.

“Q. You did not know then that they were doing it?”

“A. I know that they are handling steel; yes, sir.”

The South Buffalo Railroad has not a connection with the water front so they can deliver steel. They have a water-front connection right at the Bethlehem plant. We asked them to handle our freight that way—that is, that we would truck it to the water—and then have the canal barges come to their docks and take it, and they refused. We never made application to either the Interstate Commerce Commission or the Public Service Commission to compel them to do that. The quickest way for us to get to the water would be through our own railroad that we were on, if they would furnish us this facility. (Tes. 47-50.)

The embargo that I have spoken of went into effect in September and lasted approximately until April. The South Buffalo was never embargoed; it was against the South Buffalo. I will swear 152 that the New York Central embargoed against the South Buffalo. Nobody knows if it was a general embargo against receiving any freight from the South Buffalo. It was a difference in the interpretation of the embargo. That is where we got into trouble. They took some material from other people and discriminated against us for a long time until they found it out. They would take it from industries off their own line of railroad, but not from the South Buffalo, which they considered as a connection. I can not swear to any particular plant that told me that at all times the New York Central gave them, took their freight during this embargo. I can not make the statement as to the name of one plant that told me that facilities were given to it when there was a general embargo. The embargo was against the South Buffalo, and not against the industries in Buffalo; that is where we got into trouble. I will swear that there was an embargo against the South Buffalo at the same time that New York Central was taking freight from their industries located on their line—in the city of Buffalo. The Pierce- 153 Arrow Motor Company is one industry; I got that information from Mr. Hickey, traffic manager of that company. (Tes. 50-53.)

It was during the time the embargo was on; I don't recall the date, but that is what got us into the proceeding. It is a question if there was a general embargo against the South Buffalo, even though we had the canal boats, even though the connection was made with the canal terminal at the point in question, that our product could not be moved. With the conditions that if there was an embargo against the South Buffalo Railroad Company, upon which we were located then, we would not be able to reach this terminal, even though the New York Central made a connection. We would have changed the conditions.

The embargo was on shipments to points east of Buffalo, and we would have insisted that the commission take some steps to get them to permit us to take the stuff over to the barge canal. They had for their excuse that there was a congestion at New York City, and that is what we wanted to get around. (Tes. 53-54.)

I said that there were contracts that we bid on that we did not get. We expect to get all contracts that we do the engineering for, and the architects specify Corrugated Bar Company's product, if the price is the same, and we can deliver it on the job for the same price or less. That is what we figure on. The other people figured lower than we did and got the job. Their locations might have been such that they could afford to bid lower than we could, or at least they did bid lower than we did. In the case of the Donner Steel Company, it was on account of being on the barge canal. They were on the barge canal. The Bethlehem Steel Company is on the barge canal. The company down in Newark that got this contract is not on the barge canal, but they have a 16-cent rate from there. I said at Rarritan. I suppose there are times that we underbid the Donner Steel Company on jobs. There are times that we have underbid the Lackawanna Steel Company or the Bethlehem Steel Company. There are not to a great extent a great many other things that enter into the acceptance of a bid. The main thing is the freight rate. The price of steel is usually f. o. b. Pittsburgh, and it is a question of the freight and we have to pay that.
154 F. o. b. Pittsburgh regulates the price no matter where it is made. The sale price is not a price at Pittsburgh, plus a freight rate from Pittsburgh to destination. The cost to us is figured on the Pittsburgh to Buffalo rate when we buy steel. When we sell steel, we sell it to the best advantage that we can, but the price is usually made to us so that, for instance, the Donner Steel Company, if they can take care of the barge canal, they figure that in. The price of steel has a great many ramifications, but, as I said before, we make 50 cents to \$4 a ton, depending upon the season of the year, and if we are not able to get the use of the barge canal, we are out of it. (Tes. 54-58.)

I mean to say that in selling our product we generally do not sell on a Pittsburgh plus basis; we sell it delivered to destination. Our delivered price is not the Pittsburgh plus price; the price made by the mills is that.

I said we also meet the Belgium prices to New York. They manufacture cheaper in Belgium than they do here. They have an advantage of us in the manufacture, but the duty takes care of
156 the difference. I said that we wanted to ship last fall by canal. To handle our products, I know you could not ship from the South Buffalo road, either to the Erie road, taking it to the Union Dock, or the Lackawanna—that is transferred to any of those roads from our road. Our products require a crane, and none of those roads had any. I am sure they did not have a crane at those docks; I went down there and looked it over. I asked several railroads to put a crane in there, and even went to one of the railroads to hire a crane in order to load a barge and could not get it. I don't know what railroad that was—it was in the G. Elias plant, whatever road they are on. They had some room there, and we

tried to load up some business there and we could not get a locomotive crane. Our plant is about 6 miles from the terminal down here on Genessee Street as the crow flies. I do not think it would be 16 miles or more to take it around the New York Central to reach this dock; I do not know. The nearest way would be to take it through East Buffalo, from West Seneca to East Buffalo. From there I don't know just how they get to Genessee Street. I
157 don't know of any easier way than that. (Tes. 58-60.)

Redirect examination:

As to how the facilities, as to mechanical efficiency and possibilities of use along the Buffalo Creek, and along the South Buffalo Railroad, compare with the facilities furnished by the State at its docks on the barge canal terminal: The State has cranes for handling all our materials, whereas the South Buffalo Railroad, or the Buffalo Creek, have absolutely no facilities for handling steel. The only facilities on the South Buffalo—I made the statement previously that I thought the South Buffalo had water connection with the barge canal, but they have none, it is owned by the Lackawanna Steel Company, who also own the cranes, and are competitors of ours, and they have refused repeatedly to load any barges for us. The water-front property and facilities are owned by the Lackawanna Steel Company. At the time of this embargo east of Buffalo, to which I have testified, there was no embargo at that
time against intracity movement. In moving traffic from our
158 plant to the barge canal terminal, we would, necessarily, going by the shortest and quickest way, deliver to the New York Central, through the South Buffalo, at West Seneca.

"Q. Where does the New York Central connect with the barge canal terminal, in connection with the South Buffalo Railroad?

"A. They would have to deliver it to its terminal down on Genessee Street."

On a straight line, I suppose that would be about 6 miles, from our plant. I do not know just how they handle it. I assume they handle it from East Buffalo through Louisiana Street directly. I understand they handle it in a roundabout way, not the direct route. I am traffic manager for our company, and it is my business to know about those things. We ship about 150,000 tons a year. (Tes. 60-62.)

Recross-examination:

I don't know that the New York Central has not, or never had, any right to carry freight across the Terrace in this city. I did not post myself on that with reference to our traffic; I assumed
159 that they did have a right to take it the shortest way through.

I have never seen a freight car move over the Terrace. I saw these embargoes; I saw one of those embargo orders in Mr. Crowley's office. I can not give you the number of the embargo that said we were permitted to move within the city, but I can get it. It is a matter of how you interpret the embargo. That was not

my interpretation; I know that other people were moving it the same way. It was a matter of interpretation. It was an ambiguous embargo.

Concerning the facilities at Rarriton for handling steel, I don't know if there were any cranes there for that purpose; I was not there. Even though we loaded our canal barges here with a crane, I don't know whether we would have any crane down at the other end, at Rarriton, to unload them with—but that was not the point—. We did not ship down there. That is our competitive point. I don't know whether there was a crane there or not that could unload, providing for the unloading of canal boats—we knew that we could not get the business. The matter of cranes did not enter into it; the rate was 16 cents a hundred, and we didn't care how they got it there. (Tes. 62-65.)

(Witness excused.)

Mr. FRANK E. WILLIAMSON was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination:

My name is Frank E. Williamson. I am traffic manager of the Buffalo Chamber of Commerce, and have been traffic commissioner since October 28, 1913. As to whether I was present in court at the hearings held in Buffalo, of which a transcript of minutes was taken, in Exhibit 4: I do not know whether that was the identical case or not, but I was before the Public Service Commission at the time. If you say they are the minutes, I believe it. I was there. I was present in court throughout those hearings. I heard the different witnesses testify as to their needs for the use of the barge canal terminal at Buffalo. From my knowledge of the situation here in Buffalo now, there has been no change in the situation as disclosed from the testimony at that time. I think the need
161 for the terminal has increased to some extent. My position as traffic commissioner of the chamber of commerce is to look after all of the rate adjustments, classification adjustments; to prepare data and facts to be adduced at the hearings before the Interstate Commerce Commission and the Public Service Commission. It is various besides that. It brings me into constant contact with shippers within the city of Buffalo and vicinity.

"Q. Will you go on and describe how it is possible to make use of the barge canal terminal through the interchange or traffic by the New York Central Railroad Company?

"A. I would like to read a letter that was sent out to a number of our shippers in Buffalo, having side-track facilities, dated April 6th, 1922."

(Objection made to reading of letter, and objection sustained.)

Under date of April 6, 1922, there was a letter sent to various shippers in Buffalo, calling their attention to the fact that the State was preparing to take their case before the Interstate Com-

merce Commission, and we asked that the shippers having side
162 track facilities furnish us with a statement of the prospective
business which they would move over the canal with this con-
nection, and services were rendered by the New York Central Rail-
road Company. We got something like 81 answers—from 81 firms—
to our communication. I don't know how many of those answers
state that they would use the barge and the terminal. I am going to
submit them as an exhibit. I have not classified these letters.

(Objection made to these letters being submitted as an exhibit,
and objection sustained.)

This exhibit which I submit shows the prospective tonnage that
these various shippers would make over the barge canal; it would
approximate from 100 to 125 thousand tons a year. (Tes. 65-70.)

In my opinion the prospective business moving out of Buffalo, or
into Buffalo over the barge canal terminal if this interchange with
the defendant were established, based upon the replies received

from these various shippers, would be approximately 100,000
163 to 125,000 tons. I have reason to believe from these state-
ments, and in conferences with certain of these shippers, that
that is the case. I derive that opinion likewise from my entire
knowledge of the commercial situation in the city of Buffalo. (Tes.
70-72.)

Cross examination:

My statement as to the approximate amount of tonnage that could
be offered is largely based on the letter that we wrote and the
replies received from certain people. I have other information that
there is tonnage that is not mentioned of these different concerns
that would move via the canal, if this service was rendered. I sent
out the letters to a great many different people, and there were a
great many I did not receive any reply from. There were a great
many that were adverse for the reason that they were not particu-
larly interested, or did not have the class of freight to move. (Tes.
72-73.)

(Witness excused.)

Mr. G. ROY HALL was thereupon called as a witness, and having
been duly sworn, testified as follows:

164 I am the secretary and general manager of the Interwater-
ways Line, Incorporated. I am not sure of our status here,
but we are interested in the case. My company is a Delaware cor-
poration with its principal offices at 42 Broadway, New York City.
We are engaged in operating boats on the New York State Barge
Canal to New York and Buffalo. We operate 5 steel motor ships—
254 feet long, 36 feet beam, 14 feet deep, with a capacity of about
2,000 net tons, on a draft of 11 feet. Our eastbound business—that
is the heaviest business we have—consists mainly of grain shipments
from Buffalo elevators to the port of New York for export. Our
westbound business is the best we can find at the port of New

York and delivered to Buffalo. I think our concern was incorporated in the spring of 1921. We started out with the 5 steel motor ships that I have described. We have no definite plans made or contracts let at this time for an increase of our equipment. There is not available to us at the present time any business through the Erie Basin barge canal terminal; we have not been getting any business at the Erie barge canal terminal. This is due in some instances 165 to the fact that there was no service from the terminal, or between the terminal and industries located on the railroads in the Buffalo switching district. (Tes. 73-75.)

Cross-examination:

I do not know if there are a great many mercantile houses in Buffalo which have no rail connection. I did not know that there are more than half of the industries and mercantile houses that have no rail connection. I thought the Urban Milling Company had a rail connection.

I do not know what is the mean draft of the Erie Canal at the present time. I do not know much about the Erie Canal; most of it has been abandoned. I do not know anything about the Erie Barge Canal. We operate our boats on the New York State Barge Canal; there is quite a distinction. The mean draft of the New York State Barge Canal from Tonawanda to Waterford is about 9 feet. In the summer time the draft does not get any lower. Our experience has been that they have means of storing up water so that they maintain it. It was maintained last summer. I will swear 166 that at times it was more than 8 foot minimum. Outside of grain we have taken pig iron from Buffalo eastbound. I think we got some at the Wickwire plant and some at the Lackawanna Steel Company's plant. None at the Rodgers-Brown Company plant or at the Donner plant. On the westbound, some of our freight came to Buffalo, and might have ben forwarded beyond by the owners. Some of it we carried on through bills of lading to points beyond. It was linseed and phosphate rock. The linseed was delivered into the various elevators, and the phosphate rock was delivered, I think, to the Lehigh Valley terminal. We did not deliver anywhere except to docks and elevators. No freight was offered to us to be delivered at any place other than docks and elevators—the reason for that being that the boat would have to have some place to deliver. There is nothing that I know of to prevent trucks from delivering freight at this terminal, the Erie Basin terminal.

"Q. And trucks are used?

"A. You speak now from a physical sense!

"Q. Well, of course, we don't use trucks in a mental sense.

167 "A. The cost might be an element in the delivery, though.

"Q. Well, that is very material, too.

"A. It is very material in our business." (Tes. 75-80.)

I have no figures with me showing what it costs to truck material to the docks. I don't know that it is cheaper for the shipper here

in Buffalo to send his material, freight, to the dock by trucks than it is to load and unload the cars; I would not think it would be. I don't know of any instance here where the railroads, where industries are on their line, pay a trucking company to truck it to this dock instead of sending it over their own lines. I have heard of the corporation Larkin & Company. They are manufacturers here, located on the New York Central Lines. I do not know of the New York Central hiring trucks to carry their freight that they want to send over the canal, rather than to take it and deliver it by their own cars. We have not filed any tariffs with the Interstate Commerce Commission covering our rates on the canal. I remember

there being an embargo on the railroads last fall here—when
168 the railroads could not carry grain. It is our intention to participate in paying the cost of this transportation to and on the terminal dock to the State, wherever it may be necessary to compete. The railroad company carrying straight from New York to an industry in the city of Buffalo makes the same rate that they would make from New York City to the canal terminal, so that in order to compete the canal line must make a delivery at the industry, absorbing the charges, naturally, where it can. There are more industries not located on railroad tracks than are located on railroad tracks; that would be fair toward the other industries that are not located on railroad tracks. The State charges the boat man or the shippers for the use of the machinery on the docks. It does now; I did not know that they had ever ceased to charge. I did not know that they had changed this morning. I have been so busy on this case that I have not heard what is going on up to this morning. I was on the New York Central train coming up here. You don't hear much on the New York Central. I don't know that the New

York Central is the heaviest taxpayer in the State of New
169 York. (Objected to and objection sustained.) (Tes. 80-84.)

We have not filed any tariffs with the Public Service Commission of the State of New York, so that we are free to raise our rates or lower them just as we wish without any control by any public body. We pay the gross earning tax to the State for operating over the canals. That is what we all do; you and I are in the same boat. We are not seriously competing with the New York Central. (Tes. 84-85.)

Redirect examination:

As to the reason why we get all of our business from docks and elevators: I do not know of any other way that a boat could do business without having a dock or some facility for interchanging freight. (Tes. 85.)

(Witness excused.)

Mr. ROBERT W. DAVIS was thereupon called as a witness, and, having been duly sworn, testified as follows:

170

Direct examination:

I am president of the Rochester Terminal and Canal Corporation. That corporation has been organized since February, 1922. Our main offices are in Rochester, N. Y. We are a corporation organized and doing business under the laws of New York State. Our business is carrying bulk cargo freight on the barge canal. We are operating now about 30 boats. The boats are three and five hundred tons; the 500-ton boat is about 100 feet long. None of them are self-propelled. They are pulled by tugs. We own 3 of the tugs and 10 of the barges. We get our business principally from Rochester and New York City. We do not get any business moving from the east to the west through the port of Buffalo. We do not get any business directly from the port of Buffalo moving from the west to the east. The failure of the New York Central Railroad to interchange traffic at the barge canal terminal at the Erie Basin barge canal terminal in Buffalo has, in a limited way, an effect on our business.

We have thus far been unable to arrange for transfer from
171 barges to cars here. We have had such business offered to us.

I could not answer the question as to whether we ever had to refuse or accept it. I don't know whether our general manager has finally completed arrangements for it or not. Personally, I have been engaged in the canal business since February 1922. (Tes. 86-88.)

Cross-examination:

Our business is principally between Rochester and New York. I could not answer what the industry was that I said we could not arrange transfer from the barge to the car here in Buffalo. The commodity was roofing asphalt. Only by hearsay I know that the company was on a railroad. I don't think it could have been trucked as well as sent on cars. I have never seen how they handle their stuff. Our company does not file tariffs with the Interstate Commerce Commission; we are not in the interstate-carrying business. We do not file tariffs with the Public Service Commission. (Tes. 88-89.)

(Witness excused.)

172

Colloquy between examiner and counsel

Mr. GRIFFIN. "The complainants rest. If my appearance has not previously been noted, I wish to notice as follows: The Attorney General, through myself as his deputy, appears on behalf of the Rochester Terminal & Canal Corporation, the Interwaterways Line, Incorporated, and the Corrugated Bar Company, Incorporated, who, earlier in this proceeding, by direction of the examiner, were included as parties complainant with the State of New York and its superintendent of public works. We now rest."

Mr. McCOLLESTER. "Your petition for intervention, if I may make this comment, while it mentions the name of the Corrugated Bar Company, Incorporated, in the caption, contains no reference to that company in the body of the petition, or any information about it."

Mr. GRIFFIN. "You will recall that at the time I made my two motions, one for intervention and one to join these parties as complainants, I asked for intervention only on behalf of the two common carriers, but I asked that all three parties be made parties complainants. It was unnecessary to draw a formal petition for the first motion to join the three additional parties complainants, under the rules and practice of the commission. It was necessary to draw a formal petition for the intervention of the two common carriers. That I have drawn and submitted."

Mr. McCOLLESTER. "Mr. Examiner, it would seem that an amended complaint which includes a new party complainant ought to contain information as to who the complainant is, the complainant's interest in the proceedings, and the subject of its complaint."

Mr. GRIFFIN. "That is on the record. They have been sworn and testified as to that."

The EXAMINER. "My recollection is that in the statement that counsel for complainant made at the time he amended his complaint; he stated the nature of the added parties——"

Mr. GRIFFIN (interrupting). "And I particularly direct examined each party along those points, showing that they were New York corporations, where their principal offices were, and what their interest in this case was."

Mr. SPRATT. "I move that their petition now be stricken out, and also all evidence pertaining to it be stricken out for the reason that it appears now that they are not common carriers, not amenable to any regulation, even by the State."

The EXAMINER. "The motion will be overruled. It may be noted on the record." (Tes. 89-91.)

(Hearing closed.)

73 [Amended formal complaint omitted, see Exhibit "B."
Printed side page 30, ante.]

79 Before the Interstate Commerce Commission

Docket No. 14777

STATE OF NEW YORK, AND EDWARD S. WALSH, SUPERINTENDENT OF
Public Works of the State of New York, complainants

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, DEFENDANT

Answer of the New York Central Railroad Company

Answering the complaint in the above-entitled matter, this defendant—

1. Admits the allegation of the complaint contained in the paragraph thereof designated "1," except that it denies so much thereof

as may be deemed to allege that the State of New York is a common carrier either by rail or by water, and alleges that the State of New York is not a common carrier either by rail or by water within the definitions contained in the interstate commerce act.

2. Alleges that it is a steam railroad common carrier in the State of New York and other States.

3. Admits that the State of New York has expended large sums of money for the construction of its barge canals between various points in the State, and has also expended large sums of money in the construction of canal terminals situated at different points within the said State, but denies knowledge or information sufficient to form a belief as to the precise amount and extent of such expenditures.

4. Admits the allegations contained in paragraphs thereof designated "4" and "5."

180 5. Admits that there is a physical connection between defendant's tracks and the tracks within complainants' terminal and that this is the only method of steam railroad interchange now available between the barge terminal and industries and team tracks and stations located on defendant's lines at Buffalo, N. Y.

6. Denies the allegation contained in paragraphs designated "7" and "8."

7. Answering the paragraph designated "8a" defendant denies that it has prevented the moving of any traffic through said barge canal terminal and says it is not informed as to the amount of interstate or intrastate traffic attempting to move through said barge canal terminal.

8. Admits the allegations contained in paragraph designated "9."

9. Further answering the complaint and as a separate defense thereto; defendant alleges that the State of New York is not a common carrier by rail or by water and has no status under the interstate commerce act to maintain this proceeding and that this commission has no jurisdiction to entertain a complaint preferred by a person, individual or corporate, having the status of this complainant.

10. Further answering the complaint and as a separate defense thereto; defendant alleges that no carrier by water is a party to this proceeding and that the exercise of the jurisdiction conferred upon this commission by subdivision 13 of section 6 of the interstate commerce act is conditional upon the presence in this proceeding of each and every of the carriers by water required to participate in the payment of the expense of operating water and rail terminals, switching charges, joint rates, the division of rates and other charges incident to the transfer of freight or passengers at such rail-water terminals, including the Erie Basin barge canal terminal mentioned in complaint.

181 11. Further answering the complaint and as a separate defense thereto, defendant alleges that the barge-canal terminal described in the complaint is one of a chain of terminals which are used or intended to be used in connection with the barge canal itself,

extending from Buffalo easterly through the State of New York to the Mohawk River and thence to its confluence with the Hudson River and down the Hudson River to the city of New York, with extensions of the canal system reaching Lake Ontario, the Finger Lakes, and Lake Champlain. The barge canal proper is parallel to and a comparatively short distance from the lines of railroad owned by this defendant extending across the State of New York and down the Hudson River. Barge-canal terminals have been constructed, or are under construction, or have been planned with reference to any city and town or any consequence between the terminal of the bar canal as above described, and all of such points are directly reached by the lines of railroad owned and operated by this defendant.

As defendant is informed and believes, the present proceeding would require this defendant to operate not only from its physical connection with the barge-canal terminal at Erie Basin, Buffalo, N. Y., but to operate the terminal itself and to switch to and from said terminal to shippers and consignees located in and about the city of Buffalo, or for transfer to other railroads connecting with the defendant's lines in and about the city of Buffalo. Such movements would be wholly switching movements and would not, unless under very exceptional circumstances, involve even a short haul along the main tracks of this defendant. As defendant is informed and believes, if the complainant here is successful in this proceeding, it is its intention immediately to apply further to this commission to compel this defendant to operate all the other barge-canal terminals and perform switching service in connection therewith throughout the length of the barge canal and its water connections from Buffalo to New York. In such operations this defendant

182 will be deprived of any railroad haul of consequence. There would and could be no element of reciprocity in the switching, and defendant, at great loss to itself of traffic which would otherwise move over its rails, will be compelled at unremunerative compensation to join in an effort the purpose of which is to divert traffic from its own rails in order to benefit water carriers not before this commission. Many of the barge-canal terminals, as constructed or proposed to be constructed, are situated away from the commercial centers of the towns and cities which such terminals are intended to serve, and the railroad operation of such terminals and the performance of switching service would, in every instance, as this defendant is informed and believes, be accomplished at great expense to defendant and by a diversion of locomotives, cars, and operating crews from their regular functions, to the detriment of the transportation business conducted by this defendant, and to the prejudice of shippers and consignees served by this defendant.

The situation of this defendant with reference to the barge canal is unique as regards other rail carriers whose lines line within the

State of New York. Several north and south lines, especially rail carriers transporting coal, intersect the barge canal substantially at right angles and preserve a reasonably long haul for themselves in any interchange of traffic.

Wherefore this defendant asks that the complaint be dismissed.

CLYDE BROWN,

Attorney for Defendant,

1110-466 Lexington Avenue, New York, N. Y.

APRIL 25, 1923.h

183 [Filed at hearing, 6/15/23. T. C. D.]

The Interstate Commerce Commission

Docket No. 14777

THE STATE OF NEW YORK AND EDWARD S. WALSH, SUPERINTENDENT of Public Works of the State of New York, Rochester Terminal and Canal Corporation, Interwaterways Line, Inc., Corrugated Bar Company, Inc., complainants

against

THE NEW YORK CENTRAL RAILROAD COMPANY, DEFENDANT

Come now your petitioners, Rochester Terminal and Canal Corporation and Interwaterways Line, Inc., parties complainants above named, and further respectfully represent that they have an interest in the matters in controversy in the above-entitled proceeding, and desire to intervene in and become parties to said proceeding, and for grounds of the proposed intervention say:

I. That your petitioners are corporations organized and doing business under the laws of the State of New York and Delaware, respectively, and their main offices, respectively, are at Rochester, New York, and New York City; that they are common carriers operating canal boats, tugs, and other equipment for the transportation of goods, wares, and merchandise upon the barge canal of the State of New York.

II. That your petitioners operate in to and out of the Erie Basin barge canal terminal at Buffalo, New York, and it is essential to their business that they should be able to interchange traffic with the defendant, New York Central Railroad Company, since they have no other means of reaching carriers by rail in the Buffalo switching district at the Erie Basin terminal except from the lines of the defendant.

184 Wherefore said petitioners pray leave to intervene and to be treated as parties hereto with the right to have notice of, and appear at the taking of testimony, produce and cross-examine

witnesses, and be heard in person or by counsel upon briefs, and at the oral argument, if oral argument is granted.

Dated, June 15, 1923.

ROCHESTER TERMINAL AND CANAL CORPORATION,
By R. W. DAVIS, *President*.
INTERWATERWAYS LINE, INC.,
By G. RAY HALL, *Secretary and General Manager*.

185 Before the Public Service Commission of the State of New
York—Second District

Case No. 7060

IN THE MATTER OF THE COMPLAINT OF EDWARD S. WALSH, AS
Superintendent of Public Works of the State of New York

against

UNITED STATES RAILROAD ADMINISTRATION—NEW YORK CENTRAL
Railroad—as to operation of railroad tracks at Erie Basin,
Buffalo

Before Chairman HILL at Buffalo, N. Y., January 17, 1920.

Statement of evidence

[Appearances of counsel omitted in printing.]

Narrative statement of testimony

166 Mr. FRIEND P. WILLIAMS was called as a witness in behalf of
complainant, and being duly sworn, testified as follows:

I am special deputy State engineer and have held that office about a year. I have been connected with the State engineer's department about 14 years. The blueprint you show me entitled, "Terminal Contract No. 61, Erie Basin, Buffalo," dated March 12, 1918, represents the Buffalo terminal of the barge canal. That map is produced from the State engineer's department.

(The map was received in evidence and marked "Complainant's Exhibit No. 1.")

The barge canal terminal at Buffalo has been under construction for 3 or 4 years and is still being completed under contract. The lay out there consists of the Erie Basin, dredged to about 20 foot depth of water, and there are two piers, one about 500 feet long and the second pier about 400 feet long. They are Piers No. 1 and No. 2 on the blueprint; Pier No. 1 is the longer and is about 600 feet, I should have said. The other one is about 400 feet with a bulkhead about 800 feet long. A bulkhead is a wall along the water; a wall boats can tie up alongside. The bulkhead is longer

than the pier, together with area on the upland for storage and other facilities. The water line, if you start in at the right, is along the double line above the word "Basin." That is, it follows along that double line around Pier No. 2, and the double line gives a continuous outlet of water to Slip No. 3. The property line on the upland is Rock Street—the westerly boundary of Rock Street. There is a piece of land between our piers and the westerly line of Rock Street which is crossed by these connecting tracks, which is part of the terminal property—the State property.

187 Continuing the reference to the terminal at Buffalo, the facilities include a warehouse on Pier 2, about 32 by 200 feet, not shown on the blueprint, and also a freight house partially constructed, about 80 by 500 feet on Pier No. 1, together with paving along the bulkhead and also tracks leading from the New York Central in the neighborhood of Wilkeson Street to and along the north side of Pier 2, and also along either side of Pier 1; also two Byers cranes for handling freight, and miscellaneous facilities such as water connections for doing freight business.

The switch connection is made with the New York Central siding at the southerly end of the bridge at Wilkeson Street—that is the bridge across Slip 3, shown by broken, double-broken lines being the switch. Across Slip 3, at this point, there is one bridge containing 3 tracks, 2 for their main tracks and the one on the west being a side track. This switch connects with the side track. That bridge is accurately and properly shown on the photograph you show me. The side track is to the left on that photograph. That bridge is made with 3 through girders as major members.

(The photograph was received in evidence and marked "Complainant's Exhibit No. 2.")

The side track with which the switch indicated as line A on Exhibit 1 connects is about 400 feet in length northerly from our connection to this siding. The length extends southerly for some distance to Genesee Street and beyond, as shown on the map. The photograph you show me properly represents the siding looking south.

(The photograph was received in evidence and marked "Complainant's Exhibit No. 3.")

188 Exhibit 2, previously shown, represents the siding looking north. The photograph you show me represents the south coal trestle and east shore of the basin.

(The photograph was received in evidence and marked "Complainant's Exhibit No. 4.")

The photograph you now show properly represents the coal trestle, main line, and siding tracks.

(The photograph was received in evidence and marked "Complainant's Exhibit No. 5.")

The coal trestle shown on Exhibit 2 is a wooden trestle laying at the northerly end of the basin, and extending across the New York Central tracks, and is used for operating cars over same, and they

are dumped into lake vessels that lay alongside the trestle. The bents of this trestle are at the north end of the side track with which the barge canal connects. They are not shown on this blueprint.

On Exhibit 1 the side track and main line of the Niagara Falls branch of the New York Central should be continued in order to show the entire conditions. It should be continued about 200 feet to the north. The terminal has been open to traffic since the completion of the warehouse in the late summer of 1918. There is intermittent work going on now in the construction of Pier 1. There are one or two outstanding contracts in connection with the construction of the warehouse on Pier 1. The limit of their time runs to the spring of 1920 and they are to be completed before the opening of navigation.

189 In my capacity as special deputy State engineer have had supervision of this terminal. As to my experience as an engineer: I graduated from Cornell in 1899, and for 5 years worked for the Pittsburgh, Shawmut & Northern Railroad on the construction of about 100 miles of railroad. It consisted of the designing, surveys, and construction of railroad tracks, bridges, and facilities connected with the same. Subsequently, and ever since that time, I have been employed in the department of the State engineer on a variety of structures connected with the barge canal, including track connections at various points.

The water on each side and in front of Piers 1 and 2 is 20 feet deep. Pier 1 will accommodate vessels up to about 550 or 600 feet long, with draught of 18 or 20 feet. Pier 2 boats up to about 400 feet long and the same draught. The warehouse on Pier 1 is a one-story brick construction with steel doors for the entering and discharge of freight, together with a head house for offices, and equipment for the handling of the business at the terminal. The warehouse is about 40,000 square feet in capacity. Pier 2 has a one-story frame warehouse about 8,000 square feet of area, with ample platforms, doors and office for the transaction of freight business. The wooden warehouse was constructed during the early part of 1918. It was constructed while the war was in progress to afford facilities for freight, and in that year there was considerable freight in the warehouse. The warehouse indicated on Pier No. 1 has not been used at all. The fundamental plan indicated upon the blue print, the construction of the warehouses, the plan of the piers, and the layout of the railroad tracks is feasible, proper, and without hazard in all their parts.

190 On Exhibit 1, the double lines on each side of the words, "Genessee freight yard," indicate the tracks of the railroad company for leading alongside the platforms indicated, four tracks in all. They connect through switches to all the tracks, including their main-line track. They connect with the main-line tracks and siding. The connection you indicate does not connect with the main-line track of the New York Central. It connects with a side track adjacent to their main line and westerly of same.

The barge canal terminal shown on Exhibit 1 is located in the westerly part of the city of Buffalo, on the shore of Lake Erie. The tracks into the terminal connect with the New York Central side track in the vicinity of Wilkeson Street. This portion of the New York Central track is known as the belt line, in a southerly direction extends into their yards, also their Exchange Street station, and to the east and to the north these main-line tracks of the New York Central extend northerly throughout the northern section of Buffalo and to Tonawanda and Niagara Falls. They connect at both ends with the main system of the New York Central Railroad. The route of the barge canal extends from the Erie Basin, at which the piers are located, through the southerly end of Lake Erie, or northerly end of Lake Erie through the Niagara River to Tonawanda, and thence —. The Niagara River is canalized.

"Q. Your route is by the Erie Canal, so it parallels or approximately parallels the Niagara River; is that it?"

"A. It was, and that is still in existence to-day, the old canal; but the difference in depth favors the route through the river, which is used generally for canal traffic up to Tonawanda, where the barge canal enters the land line and continues easterly through 191 to the Hudson River, according to the main barge canal route."

The barge canal is 12 feet deep, and about 75 feet in width in land line and 200 feet in river line. It will accommodate vessels of about 800 to 1,000 tons practically, and boats of 300 by 42 feet beam. The most practical operating dimensions are about 150 by 22 feet. In describing the route from the Erie Basin, it is one continuous connection with the barge canal by the waters of Lake Erie and Niagara River. The Niagara River is westerly and adjacent from the Erie Basin. The Erie Basin is a portion of Lake Erie so that boats—any boats—that lay along the piers in Erie Basin have free access to move through it into the lake and go thence through the lake and Niagara River to Tonawanda. When they get to Tonawanda, they enter the mouth of the Tonawanda Creek, which empties into the Niagara River, and go easterly through the various sections of land lines and river courses of the State to the Hudson River—on the barge canal. We get a connection by using Lake Erie and the Niagara River. That is outside, not the harbor. In using Niagara River, they do go into the open river.

"Chairman HILL. I think you do not quite understand me. When I say 'open river' I mean at the head of the river these boats connect with the open river, at the head of this—"

"WITNESS. Not by going to Black Rock Harbor.

"Chairman HILL. Not Black Rock Harbor, down to Black Rock, and out then in the Niagara River at that point?"

"WITNESS. Yes, sir."

From there they use the open river and go down to Tonawanda Creek and go through and connect with the barge canal at that point. That is the modus operandi; the physical operation.

192 The barge canal will transport freight from Buffalo from this territory to all these points on the canal to the Hudson River and from there to New York. The design here is to get a connection of the canal with the New York Central for the interchange of freight, freight moving in any direction. I would say for the accommodation of freight anywhere, in any direction with the New York Central or any road that connects with the New York Central.

(Witness excused.)

Mr. WILLIAM F. FELTON was called as a witness on behalf of complainant, and being duly sworn, testifies as follows:

Direct examination:

My name is William F. Felton; address 1450 Michigan Avenue. I am the contractor of the Buffalo Barge canal terminal. I began that contract on February 24, 1919, and some time in the spring a physical connection was made with the tracks in the yard, as shown on Exhibit 1, with the New York Central. The New York Central spotted cars within the limits of the barge canal terminal—right after the switch was connected up, got a carload of steel in and they spotted it down alongside the freight house I was building on Pier 1—to the north of the building. They took that car out. They spotted the car and took it out with their locomotives. I was present when the car was put in and taken out. Since that time they have spotted cars just outside of their siding. I suppose that is within the limits of the terminal—it is outside of their switch. We have had about 50 or 60 carloads in there on that track. As to how we have handled these cars: Coming in up to the building it is
193 down grade—just loosen up the cars and start them with a car mover and they go on down. Going back we have to take them by pulleys and appliances of the construction department and other means we have. The New York Central has not furnished any crews whatever in taking these cars—other than gravity. It is all done by our own men. It takes anywhere from 10 to 15 men to handle a car, and on an average about 3 hours. This has resulted in delay on our contract. We have made efforts to have cars spotted on this contract. I don't think I made any efforts in writing. I first went to the agent down on Erie Street and couldn't get any satisfaction from him, and he finally referred me to the assistant superintendent at the New York Central depot. He agreed to put cars in there, and the next day he did put in a car, and a few days after that we got another car or two in there and they left them up at the head of the switch, and I went back to him again and wanted to know the reason why they were not spotting them down alongside the building, and then he told me that was a mistake of their yard man or somebody, that the car they shifted in there the previous day was to be left up there just outside of their siding. No cars were

ever spotted near the building where work was going on after that time.

Cross-examination:

First, I said he put in one car on Pier No. 1—spotted it right alongside the head house. It was June 25th. That was the only one they ever put in on the track. After that they left the cars right in here [indicating]; just pushed them off their siding and left them up there. There is where we take them from and haul them back to. In hauling back they come as far as the
194 dividing switch here [indicating]. I don't know what the grade is; it is quite a job to get them up by hand. I think they call the agent that was then on Erie Street Mehl. I could not tell you now the assistant superintendent I talked with—Culkins, I think it is; he is on the second floor of the Exchange street depot, down at the Michigan street end.

(Witness excused.)

Mr. FRIEND P. WILLIAMS was recalled by complainant and testified as follows:

In order to make a connection between the interchange tracks of the barge canal terminal and the tracks of the New York Central, if a separate drilling lead or switch connection should be extended a considerable distance northerly from the point where such switching lead now intersects the tracks of the New York Central to a point of intersection of said tracks, that connection would be northerly from the present point of connection, and extend northerly about 300 feet where it would terminate in the timber work of the railroad trestle. It would parallel the present side track line of the New York Central right of way as shown on the blueprint. In order to enter the terminal it would cross slip No. 3 and along the railroad or other property to the wooden trestle to the north. That work
195 would require the construction of an embankment, the construction of a bridge, the construction of a track ballast, together with the rebuilding of a portion of the present track layout, in order to connect the same. I have made an estimate of what that would cost. In order to construct such a new side track, it would cost \$80,500, not including the right of way.

(Certified copy of extract from canal board proceedings received in evidence and marked "Complainant's Exhibit No. 6.")

Exhibit No. 6 is as follows:

"By the superintendent of public works:

"Resolved, that this board duly approves adopts and prescribes the following additional rule and regulation for the use of the terminals, provided by chapter 746 of the Laws of 1911, such rule and regulation to be enforced by the superintendent of public works:

"Terminal Regulation No. 17.

"The use of railroad tracks on canal terminals is hereby permitted on railroad companies with whose track said terminal tracks

connect, for the operation thereon of locomotives of the railroad companies required in moving to or from the terminals all rolling stock necessary in the transportation of commodities going to or coming from ports on the canal system.

"On calling the ayes and noes the resolution was adopted by the following vote: Ayes, Messrs. Wells, Newton, Williams, Walsh, 4; noes, 0.

"Certificate of E. P. Kearney, assistant deputy comptroller, attached."

(Witness excused.)

Mr. ELIAS H. ANDERSON, called as a witness in behalf of complainant, testified as follows:

Direct examination:

196 My full name is Elias H. Anderson; I am employed by the State engineer. I am assistant engineer and have been for 12 years. I have been with the department 14 years, and am now stationed at Buffalo. I have been in charge of the work at the Erie Basin barge canal terminal in Buffalo. Looking at Exhibit 1, the track leading from the New York Central to the north side of Pier 1 is laid on a 21-degree curve. The track leading to the south side of Pier 1 is laid on a 10 degree 30 minute curve. The track leading to Pier 2 is laid on a curve that is compounded, the principal part of the curve being a 16-degree curve and a short section 21-degree curvature. I worked 3 years for the Lackawanna Steel Company in mill construction, and 1 year with the Buffalo & Susquehanna Railroad in railroad construction, and 14 years in the department of the State engineer in general barge canal construction, about 8 years of that being in connection with building terminals. I have done surveying and drafting, map making, and railroad location. I have a high-school education. The sketch you show me is a map of the locality in the vicinity of Erie Basin, showing the layout of the terminal structure with track connections, and adjacent properties with their track connections. This pencil sketch is produced from actual surveys which I made. I supervised making the pencil sketch; I actually did part of the work. It is accurate. There is indicated on there the degree of curve of the different railroad spur tracks leading to the exchange elevator. The exchange elevator is adjacent to the barge canal terminal. The barge canal terminal is indicated where you are pointing. That [indicating] is Pier No. 1 of the Erie Basin terminal. The tracks crossing at the intersection of Genesee and Rock Streets are the New York Central yard tracks; also the Grand Trunk. The tracks crossing at the intersection of Church and Genesee Streets are those of the Falls Branch of the New York Central lines.

(The sketch was received in evidence and marked "Complainant's Exhibit No. 7.")

The next pencil sketch you now show me was made under your direction and is accurate. It is a continuation of the other map, showing the area just north of the basin. Certain tracks indicated at Wilkeson Street are New York Central switching tracks. They serve Montgomery Lumber Company at that point and other industries north. The degree of curvature is indicated there.

(The sketch was received in evidence and marked "Complainant's Exhibit No. 8.")

Exhibits 7 and 8 indicate the conditions within the vicinity of the barge canal terminal—southerly from the barge canal terminal to Erie Street, and northerly half a mile, approximately, from the barge canal terminal. Southerly, 1,000 feet and easterly 1,000 feet. (Witness excused.)

Mr. JOHN B. GARMAN, called as a witness in behalf of complainants, being duly sworn, testified as follows:

Direct examination:

I am harbor master in connection with the barge and Erie Canals at Buffalo and have held that position 25 years. I was directed by the superintendent of public works to make a check of the New

York Central Railroad traffic adjacent to the barge canal terminal on certain days of this week. Those days were 198 January 13th, 14th, and 15th, from 1.00 p. m. to 4.00 p. m. I made the check as directed. On January 13th there were 13 passenger trains between the harbor and that switch, two freight trains—backing and shifting. Sometimes they had a car and sometimes 2 or 3 cars. Then there were 6 light engines passed that switch on the 13th, a total of 21. Those passenger trains went over the main track, and the freight cars did also. As to those freight cars I testified to: The yard engines would go down into the yard and fetch back one or two or three freight cars and come up on this switch and then back and run them down in the yard again—run them down into the yard, on the other switch down towards the exchange elevator and Grand Trunk. These freight operations were switching operations. On January 14th, 13 passenger trains; freights, 7; light engines, 9; total 29. January 15th, passengers, 14; freights, 16; light engines, 9; total 39. Those passenger and freight operations were of the same general nature as I described them the first day.

Cross-examination:

Grand Trunk engines passed over there, and Canadian Pacific passenger trains. I don't know how many, I have seen some. I didn't take the names of the trains; I wasn't requested to do it. I suppose that this time of year is the lightest time for freight along the water front there. In the summer time, I suppose there is a great deal more traffic when the grain is moving from the elevators, but I am not around there. I stood on the track all of the time

199 while watching these trains. I marked it down on a little slip of paper when a train went by.
(Witness excused.)

Mr. PATRICK H. McKEOWN was called as a witness, and being duly sworn, testified in behalf of complainant as follows:

Direct examination:

My full name is Patrick H. McKeown. I am harbor master at Troy, N. Y., of the barge canal and Erie Canal, and have been for 6 months. There is a barge canal terminal at Troy. There is a railroad connection with that terminal. That connection is the Boston & Maine and the New York Central. They have a straight away track in, the Boston & Maine has a track parallel with the docks, and the New York Central also has one. The New York Central is nearest to the docks. As I understand, those are spur tracks to the dock. The barge canal terminal at Troy is situated on the Hudson River, and runs from Adams Street to Liberty Street, taking in Adams, Washington, and Liberty. It was my duty to keep a memorandum of the tonnage of the barge canal terminal during the last season of navigation. I have that memorandum with me. The total tonnage that was handled at the Troy terminal during the last season of navigation was fifteen thousand and some odd hundred tons; that is, including everything. Of this tonnage, between 10 and 11 hundred tons were drawn in by locomotives—trains. The locomotive drew those cars right up close to the warehouse. They spotted them at the warehouse on that occasion. The traffic that was drawn in by trains was New England traffic. As to where it was going after unloading at the warehouse. They told me that every boat that left there was going to Buffalo. The gentleman there
200 for the Government, who was the boss, told me. I saw this traffic start out very often, not always. It generally started for Buffalo. The New York Central switched cars into our terminal. The Boston & Maine also shipped or spotted cars on our terminal. The number of tons actually spotted at the terminal amounted to between 10 and 11 hundred tons. There was no inbound traffic that was unloaded from boats onto trains.

Cross-examination:

I do not know whether there was any special agreement between the State and the railroads as to shifting cars in there. I do not know the dimensions of the State property there—I could only give a rough guess. I know where the right-of-way lines of the railroads are. I will swear that the locomotives operated on State land. On a rough estimate, I would say I saw the locomotives on State land about 400 feet—I never measured it. I could not say that the 10 or 11 hundred tons put on would be about 25 cars; it all depended upon what it was. As to what it was: I can roughly state some things—toys, Mellin's food, burlap, polish, cotton goods—that is the best of my memory at the present time.

(Witness excused.)

(A letter was received in evidence as complaint's Exhibit No. 9. It is as follows:)

Complainant's Exhibit No. 9

United States Railroad Administration, Director General of Railroads. Delaware & Hudson Railroad. Greenwich & Johnsonville Railroad. Wilkes-Barre Connecting Railroad. Schoharie Valley Railroad. W. J. Mullen, traffic manager. W. G. Story, general freight agent. M. J. Powers, general passenger agent.

ALBANY, N. Y., January 13, 1920.

File AZW

Mr. EDWARD T. WALSH,

Supt. Public Works, State of New York,

Capitol, Albany, N. Y.

DEAR SIR: This railroad will perform a switching service on carload traffic from industries having private sidings under the jurisdiction of its Albany station to the barge-canal terminal at Albany, New York, at rates published in its tariffs covering such switching service which at this time provides rates \$6.50 for 30,000 pounds, excess in proportion.

This confirms phone conversation of this morning with your Mr. Grady.

Yours respectfully,

(Signed)

W. J. MULLIN,

Traffic Manager.

Mr. JAMES P. DALY, called as a witness in behalf of the complainant, and being duly sworn, testifies as follows:

Direct examination:

202 I am traffic manager of the Donner Steel Company. That firm is located within the city of Buffalo on the Buffalo River. I have been traffic manager something over 2 years. Prior to going there, I had no traffic experience with a commercial organization. I had 28 years' experience with the New York Central. I held various positions there—freight clerk, freight agent—all the duties that went in connection with these occupations generally, as freight agent and passenger agent at that time, contracting freight agent. During the last season of navigation the Donner Steel Company forwarded shipments by the barge canal. We received none, although we did receive large quantities via the Buffalo River by lake that came down the lake. The barge canal terminal has not been available for any of the business of the Donner Steel Company, the reason being, in the first place, that it has not been thrown open on a per car switching basis. In other words, if we were to attempt to switch a car of freight to the barge terminal the combina-

tion of charges, freight charges, would be so great as to be unprofitable for us to accept orders accompanied by such shipping instructions. We have had operation with lake carriers. We have had switching facilities in connection with lake carriers—not lately—when I say not lately, I mean not within the past year at our Buffalo plant. We haven't had any business to move through the barge canal if the terminal was available for the reason that we have turned down any requests to ship any less than full barge shipments. We can make full barge shipments direct from our works. That dock is on the Buffalo River, up near Abbott Road. The

203 Buffalo River connects with the Erie Basin and barges operated between our docks and the Erie Basin all last season.

We didn't take the barge from our dock through the barge canal—somebody took them. I assume the barge came through the barge canal and landed at our dock. They addressed them from New York City for moving up the barge canal, and there wasn't any other way they could come. It is somewhat conjectural as to what the switching facilities between the barge canal terminal and our dock would be. Although we have turned down some orders that were placed in less than full barge lots, in one or two instances we have prevailed upon our customers to increase the tonnage to a full barge minimum, but we have, of course, discouraged any requests of that character. Our product is pig iron, iron and steel articles, iron and steel articles, both semifinished and finished articles. The finished articles would be bars, plates, angles, and shapes. We market it in different parts of the country and abroad.

Generally speaking, the barge canal rate was less than the railroad rate on commodities we had. Possibly about 60% less; run around, say, 50 or 60, roughly speaking. I don't know the average of that—it would generally run more than 50. Of course, that could be figured, depending upon the commodity shipped—there was a difference. Most of our commodities are bulky and heavy. There is none of it but what can be loaded in open top equipment. If we can fill an entire barge or an entire fleet with our commodity, it can be done right at our dock.

204 “Q. But, on the other hand, if you want to send only part of a barge, or only enough to fill part of a barge, it would be a convenience to you to send your commodity to the terminal, there to be accumulated with other articles and sent by fleet or barge through the canal?”

“A. It would be if the track operators could absorb the switching charge up to the dock.”

As traffic manager of the Donner Company, I have made it my business to ascertain whether there is any switching by the New York Central or the Railroad Administration between our dock and the barge canal terminal. The New York Central or the Railroad Administration afford us a rate—class rates. There has never been any necessity for they actually furnishing us with cars and engines from the terminal warehouse to our dock. We never requested it—

without rates, that would not be satisfactory; I mean if the rates could be absorbed by the boat operator. The New York Central or the Railroad Administration switches cars from our plant—participates in traffic destined up the Lakes—on a per car switching rate, I believe. We have done some business with the Great Lakes Transportation Company. A few shipments—carloads only—of our commodities are carried over that line. I haven't the tariff naming the rates from Buffalo, the port to port rates. I have a copy of the Buffalo switching tariff here. Our company has been furnished switching connection with a water carrier. Since I have been connected with the Donner Company, we have done switching with one water carrier, possibly two; I think we have with two.

That switching service has been furnished by the Railroad Administration.

"Q. Has it been furnished by the New York Central Railroad Company?

"A. Not to my knowledge—excuse me, wait a moment, that
205 last question, just let me get that right. The Railroad Administration is all the roads under Government operation under what the commissioner holds. This moved, this traffic moved via New York Central."

We have had water connection with the New York Central. Of course, you understand the question coming in two varieties, as it were, first the administration and second the New York Central. If you refer to the New York Central tracks, I will let it stand then as testified.

Cross-examination:

We have reached water by the New York Central tracks. They were on commodities to the boat line, they were made at the Ohio Street Station of the New York Central. Our plant is on the D. L. & W., B. R. & P., and South Buffalo. We are not on the New York Central; we are on the Buffalo River. Lake boats and canal boats come to our plant. We are a good-sized concern; we are not peddlers, we are manufacturers. We manufacture pig iron and steel. If they want to, there is no trouble with a canal boat coming to our plant to get a load or part of a load—but they won't take part of a load. If they want to come they can.

"Q. I want to ask this question. It would be cheaper than to take it on cars, sending part of a load, sending it down to this terminal and loading it and unloading it twice, would it not, if they came up to your plant, and they only handle it from your dock to the boat, don't they; is that right?

"A. We handle it from the mill to the dock and the boat

206 "Q. Will, I say in your opinion—

"A. Yes; but the cost of loading—

"Q. Just answer my question. You can handle it from your dock to the boat, can't you?

"A. You can."

We load it from the dock to the boat. If you handle it by the cars and then handle at the dock and at the canal terminal, that would not be extra handling. It would be one less handling than if we handled it over our dock and transferred on the canal tracks. We can handle it from our plant with our plant engine—take it and put it on the dock. From there it is loaded on the canal boat, and that ends it, until it gets to New York or wherever you are sending it. If you send it by cars, it would have to be handled over two railroads to get to this terminal—send it over 3 lines in connection with the New York Central. At the present time that would entail an extra expense of handling it over the railroad. At the present rate it would not to us. It would cost somebody. If you handled it right from your plant right to the canal boat, that would simply be one water haul.

Redirect examination:

The railroad connections we have into our place are the D. L. & W., the B. R. & P., and South Buffalo—three roads. Not the New York Central. We ship things on these roads and switch eventually to the New York Central and we could get around to this terminal, but the cost would be so high, we do not attempt it. I know
207 how high it is. If we offered a car during the season of navigation last year for movement we will say via the Buffalo, Rochester & Pittsburgh—that has a direct communication with the New York Central at East Buffalo—the per car switching rate on the B. R. & P. would be assessed to the East Buffalo connection with the New York Central, and the New York Central would assess its class rate. Now, the lowest sum to switch a car of billets—billets take the sixth-class rate—the rate from the connection between the B. R. & P. and the New York Central at East Buffalo to Erie Street Dock during that time, to place it in there would be \$1.40 per gross ton, and 50 tons would be \$70 for that switching movement. That is the New York Central charge. The B. R. & P. charge would be either \$3.50 or \$5.50 per car. That wouldn't be so bad. The class rate is \$1.40 to \$1.80 per ton, depending upon the character of the freight. That makes a prohibitive switching rate. That is the reason we are unable to make use of the facilities, such as they are, for less than boat shipments from our dock over to the terminal and then going through the barge canal.

(Witness excused.)

Mr. JAMES E. WILSON, called as a witness in behalf of complainant, being duly sworn, testified as follows:

Direct examination:

My full name is James E. Wilson. I am traffic manager for Larkin Company. I have held that position a little over 2 years. Larkin Company is on Seneca Street, located on the Erie and New York Central east. There are no water fronts available to us

208 for shipments. We do a yearly business of \$25,000,000. We have some of the commodities shipped in carload quantities from the east and west. These commodities are available for shipment over the barge canal at the present time, with the proper boats and proper connections. We would get to the barge canal to make such shipment via what we call the Erie Transportation Company—would be handled by the New York Central and to our terminal warehouse, would reach our plant by the Erie Railroad. For shipping outbound, east, it would be by the Erie, New York Central, and barge canal. We receive or make shipments of commodities to municipalities situated on the barge canal. We receive a lot of import stuff through the port of New York, consisting of oils, vegetable oils, soya beans and palm—all vegetable oils, and almond pads from the Argentine for soap-making purposes, probably handle in the neighborhood of a million six hundred thousand dollars import tea and about the same of coffee, and sugar would be in excess of that, and then we have another account of rugs. I have been told our rug account runs something like three million dollars a year, and we are, have for some time been, buying a lot of rugs from Yonkers and Amsterdam, N. Y. I said rugs and carpets. They are imported from foreign countries; I can't say just from what country we import. They are not domestic. These commodities are shipped to us at the present time by carload lots and less than carload. During the season of navigation they are shipped by railroad. Before I came with the company we received some over the barge canal. Since I have been with the company we have not—the expense of hauling was one of the elements—cartage, and then not having
209 proper boats, and not being equipped with their terminal facilities at the various towns where we did business. We could ship or receive our commodities over the barge canal if we had rail connections between our factory and the barge canal terminal. As to whether we would ship these foreign imports and domestic shipments over the barge canal if we had such rail connections: That would be governed by the supply we had on hand. If we were not in any particular hurry for the goods, we would use the canal and save the cost of transportation. If rail connection is not established between the barge canal terminal and our factory, we would be deprived of the barge canal terminal in the Erie Basin. That is not the only barge canal terminal in Buffalo. It is not the only one available for operation in 1920—there is another connection at Ohio Basin, or, as called by another name, Union Dock. I am not just familiar with it.

Approximately I know where the barge-canal terminal is situated as shown on Exhibit 1. I am not fully acquainted in Buffalo—a good deal of it—but I know where it is. We would be deprived of the use of that terminal if rail connection is not established between that terminal and our factory.

Cross examination:

For distance, the Ohio Basin, and Union Dock, is very much closer to our place than the Genesee Street station we are talking about. I do not know how it would be by rail, handling into the terminal. On distance; yes. This over on the Genesee Street property, or Erie Basin, is away over on the other side of the city. As I understand it, you would have to go away around the belt line to reach
210 your place. In a way we could use the Union Dock. I don't know enough about it to say if we have been doing business there at Union Dock. From what I heard we can not use the barge canal terminal now in my opinion.

I have been told Ohio Basin has railroad facilities, too. That is close to the New York Central Railroad and to the Erie. I could not say that these two railroads would reach—could reach—from that basin—our property—much easier than from this basin. We would ship tea and coffee by canal. We would ship rugs with proper boats. At one time we tried to use the barge canal for resin. That was not the only thing; we used it on our shipments of lamps from New York. We have in the neighborhood of 100 or 150 carloads of lamps from New York in a year. That wasn't satisfactory at that time.

Redirect examination:

That was the old Erie Canal we used at that time. We haven't used the barge canal since I have been with the company. The canal I referred to that we did use was the old Erie Canal. The time in transit, ordinarily, between New York City and Buffalo on freight, rail movement, is all the way from 3 to 10 days.

Recross examination:

By 3 to 10 days, I refer to the railroads. I could not pick out a particular shipment where it ran 10 days. The normal time, if the railroads were under their own management, would not be 48 hours, so far as our shipments are concerned—from New York to

Buffalo—not to get them delivered, not to be in shape to
211 deliver them. We used the New York Central every day.

At the time before the Government took over the roads, I knew the Lackawanna delivered here under a guarantee within 2 days, but that has been extended to 3 days. It does run from 3 to 10 days now. I do not think we are getting our shipments over the West Shore in less than 7 days, running from Oneida; all the way from 5 to 7 days. I hate to have you put it since the Government took control.

Redirect examination:

That 3 days' or 2 days' service is not a special service; it is their regular schedule, I think.

(Witness excused.)

Mr. MATTHEW A. EWEN, called as a witness in behalf of complainant, and being duly sworn, testified as follows:

Direct examination:

I am connected with the National Aniline & Chemical Company, 351 Abbott Road, Buffalo, as traffic manager. I have held that position 2 weeks in Buffalo, and a year and a half in New York as assistant traffic manager. Our plant is located in the South Buffalo section of the city. We are on the Buffalo Creek Railroad, a switching line. We are right on the Buffalo River, but have no docking facilities whatever. We have no water facilities for the shipment of freight. The commodities we use in bulk as to our raw product principally, so far as would affect any canal movement, would be nitrate of soda and some miscellaneous chemicals, such as acetate of soda. Nitrate is foreign and domestic. These commodities come through the port of New York. We have no rail connection at the present time with the barge canal terminal—Erie Basin—as shown on Exhibit 1. We could ship or receive part of our commodities through that barge canal terminal if we had a rail connection. We could ship the foreign and domestic shipments I have just spoken of through that barge canal terminal. The lack of any such rail connection deprives us during the season of navigation of use of such terminal.

Cross examination:

We could build a dock there if we wanted to along our property. I don't know as to the exact depth of the water there. As to the geographical layout of Ohio Basin or the terminals in Buffalo I am not in a position to answer; I have not been in the city long enough to answer.

“Q. Well, the Ohio Basin you could use in connection with the Buffalo River, couldn't you; the Buffalo River comes into the Ohio Basin there, and that basin has a connection with the Erie Railroad and the Buffalo Creek, and you know the Buffalo Creek is owned part by the Erie?”

“A. So I understand, the Lehigh Valley and the Erie.”

I don't know if we have a connection via direct rail with the Ohio Basin. I don't know that the Buffalo Creek owns the Union Dock. I know that we did handle last year some nitrate coming from the Buffalo Union Dock, which was served by the Pennsylvania Railroad, as I understand. I am not in a position to state that it is Pennsylvania land, but that the Buffalo Creek runs over it; that may be.

213 We had the use of the canal last season for one shipment of nitrate. Last year I believe we could have had use of it if we wished. I am not in a position to state why we could not use it this year just the same; I don't think I would want to answer that question. I have a general idea from the map only where the belt line runs. I don't think I would attempt to answer as to the dis-

tance, both of the distance you would have to go to reach this basin and the Ohio Basin or the Union Dock.

The volume of business we would do would not justify us in putting in a dock of our own for express canal purposes. I haven't any idea what the expense would be to put in a dock.

(Witness excused.)

Mr. EDWARD S. WALSH, the complainant, being duly sworn, testified as follows:

Direct examination:

I am State superintendent of public works, duly qualified and acting as such, and have been since May 3d, 1919. The use of the Erie Basin canal terminal at Buffalo is provided by me as superintendent of public works to carriers operating on the canal without charge. The canal terminal act prescribes on the recommendation of the superintendent of public works, subject to the approval of the canal board, that the superintendent of public works may impose charges for the utilization of canal terminal facilities. Up to the present time in the city of Buffalo, I, as superintendent of public works, have prescribed no charges for the utilization of
214 such terminal facilities. I understand that the Union Dock, mentioned here, is a private terminal of the Buffalo Creek Railroad. I know that canal carriers operating over that terminal are compelled to pay for that privilege there to the owner of the terminal.

Cross-examination:

There was no action taken by the canal board permitting me to charge or give free service, except that the matter was placed in the hands of the superintendent to use his own discretion to charge or not to charge. I don't remember if they adopted a resolution to that effect. I could find out the fact.

Redirect examination:

Prior to my assuming the office of superintendent of public works, for a number of years I was an operator of canal lines on both the barge canal and the old Erie Canal. While I operated the boat line I carried considerable quantities of freight from New York City to Buffalo. I carried every commodity practically that the railroads carried; rugs, teas and coffee, boat load lots, sugar in boat load lots. These commodities do not incur any appreciable risk by canal transportation. The name of the line was the Syracuse & New York Canal Line, Syracuse and Oswego, in that time about 60 years. I operated from New York to Buffalo; Rome, Utica, Rochester, Syracuse, all points along the line of the canal.

(Witness excused.)

215 Mr. WALTER R. GALVIN, called as a witness in behalf of the complainants, and being duly sworn, testified as follows:

Direct examination:

I am the western agent of the Shippers Navigation Company, Incorporated, and have been since the company incorporated, about 4 years ago. That company operates steamers and barges on the barge canal in the State of New York between Buffalo and New York City and intermediate ports. The steamers and barges of our company sometimes make the trip from New York City to Buffalo in less than 7 days. This summer the steamer and barge of our company made that trip in 112 hours. The name of the steamer was "E. T. Douglas."

(Witness excused.)

Mr. JOHN C. WERTZ, called as a witness in behalf of complainant, and being duly sworn, testified as follows:

Direct examination:

I am the traffic manager of the Rogers-Brown Iron Company, 312 Erie County Bank Building. I have been with that company 13 years. I have looked after the traffic work all that time, although I did not carry that title all that time. With respect to the railroad, our plant is situated on the South Buffalo Railway, Pennsylvania Railroad, and Lehigh Valley Railroad. It is in the southern part of Buffalo and is also on Lake Erie. Permit me to say it is on
216 the Union Canal, via Lake Erie. That is a joint canal used by the Rogers-Brown Iron Company and the Pennsylvania Railroad. It is no part of the barge canal or Erie Canal system. We, therefore, have water facilities for our shipments. Our company manufactures pig iron and steel products. We get our raw material from Minnesota and Michigan and from Pennsylvania. We do not get any through the port of New York. We have carload business available for shipment through the barge canal terminal to such points as Syracuse, Troy, Albany, and Schenectady. We make those shipments by rail. Through the roads on which we are located and the New York Central we can reach the barge canal at Erie Basin. Such connection is not available for us because of the rate and the fact that delivery is not established—no deliveries established. The failure of the Railroad Administration and the New York Central deprives us of the barge canal terminal on carload business to the points in question.

Cross-examination:

They could bring canal boats up and take less than whole cargoes now from our place, but I think that has never been done. I presume they could go around and collect from those places with a boat until they could collect cargo loads, although that has not been the practice. I presume they could. I know where the Ohio Basin

is. That is much nearer to our plant than the Erie Basin, but it is a question of facilities——
(Witness excused.)

Mr. EDWARD S. WALSH, recalled, testified as follows:

Direct examination:

217 The construction work at the Ohio Basin terminal at the present time and for the 1920 season of navigation is incomplete. The facilities that are demanded there will not be available for traffic in the 1920 season of navigation. Appropriations have been made only perhaps until the 1st of May to continue the construction work at the Ohio Basin terminal. The terminal warehouse would not be provided, the dock would not be completed; in fact, would require \$1,237,000 to complete the construction of the Ohio Basin terminal.

"Q. Mr. Walsh, in canal operations in your experience, is it the practice of canal carriers to place a boat at a private terminal to receive a cargo and thence move that boat to another private terminal for another cargo until a boatload to capacity has been acquired, or is it the practice to take the various cargo quantities from one central point of concentration like a terminal warehouse?

"A. That has been the practice, yes, sir."

That principle of canal operations is identical with that of rail lines, where less than carload have to come to the freight house and cargo business come from the terminal of the industry.

* Cross-examination:

"Q. There isn't any reason why the State, if it wanted to, could not establish a system of collecting less than boat lot loads by sending a boat around for that purpose from time to time to the different plants?

"A. The State is not in the transportation business."

There is a reason, and that is because the State is not a common carrier, in the transportation business. There is no physical
218 reason why, supposing a line like this ought to be established, if they saw fit to do that business, they could not send a boat around and collect less than boat load lots and bring that to the terminal dock to be put on other boats then, but there is no business reason why it should be done. It is physically possible, of course. It could not be picked up just as well that way as by a car of the railroad and taken to the same place.

"Q. With your experience with the expense of loading and unloading boats, can't that be done at the minimum?

"A. Well, that wouldn't be boats, that would be individual factories."

It is possible for them to take them at the pick up place and unload them at the dock down there for loading and transportation, but they never have.

Redirect examination:

"Q. In answer to Mr. Spratt's question that it was physically possible, is that a marine practice?

"A. Never."

Recross-examination:

In New York City and other places, they use lighterage. I say it is physically possible to do the same thing at Buffalo, but it is entirely impracticable—it is not much good as a business proposition; it would result in loss.

"Q. Why should it result in more loss to load and unload a scow if necessary instead of a canal barge, to load and unload that, than it would to load it on a railroad car and move it over several
219 roads, several connecting roads, and take it to this terminal and unload it there, than it would be to load it on a barge or scow and unload it into a canal boat, if necessary?

"A. Because it costs just as much to move a boat or barge for one car as it would for ten, and because paying for the loading and unloading and cost of transfer at the terminal and so on would practically make it prohibitive; it could not be done."

On that basis, the railroad ought not to be able to move freight cheaper the whole distance than to move it by water. Not the whole distance. I say it costs as much to move by boat 10 tons as it would 500 tons, because when you take it from one point to another you have to take it all, whether it is a full load or not; that is a direct charge on what you carry. I don't know if it costs just as much for an engine to move one car as it does to move 10 cars. I am not qualified to say that they have the same labor and same amount of coal. Going around and picking up, taking half a carload here and there and somewhere else, you are getting around to the same proposition of operation as if you were picking up carloads.

Redirect examination:

As a member of the canal board, I have attended its meetings since I have been in office and am familiar with its policy. The policy of the canal board, as a rule, comes up in discussion at board meetings and formal resolutions are passed only when some particular situation has to be met. Most of it at Erie Basin is left
220 entirely to the superintendent of public works. I have notified the shippers and receivers of freight in the city of Buffalo and elsewhere along the canal that the terminals that have been constructed so far are entirely at their disposal and that freight can be loaded alongside and discharged from the boat into the terminal and no storage would be charged, no dock rental would be charged, no help for actual loading and unloading freight would be charged where the State's appliances are used because where we provide means, mechanical appliances, we are obliged to pay for the men who operate them, and as long as we pay the operators whether

they work or not, it is better to keep them busy. We established the terminal at the Erie Basin and at the Ohio Basin because it was the result of a great deal of investigation on the part of the canal board and the terminal investigating committee of 1909 that with those two sites or buildings we could serve the shippers of Buffalo by having canal freight transferred from boats on the terminal and then shipped by rail to the various industries located on switches, that could be served, as is now the case, by switching. I haven't the figures with me as to the amount of money that has been expended on this particular terminal to date; possibly about a million and a half. \$154,600,000 has been expended upon the development of the barge canal system of this State. It began in 1903. Upon terminals throughout the State, \$19,800,000 has been expended. Those terminals are situated in the city of New York, city of Buffalo, Rochester, Syracuse, Utica, Rome, Albany, Troy, Whitehall, Amsterdam, Fort Plain; well, they are down along the line, Amsterdam, Fort Plain, Fonda, Canajoharie. The Erie branch, the old western branch of the canal, what is now called the barge canal, extends east and west from Buffalo to East Waterford.

221 The improved canal system extends from Buffalo to Waterford, east. The Hudson River is used as part of the improved canal system, as is the Mohawk River and other connecting streams. The barge canal terminal shown on Exhibit 1 is equipped to handle lake traffic. I am fairly well familiar with traffic on the Great Lakes. I am fairly well familiar with the traffic on the Great Lakes that comes through the port of Buffalo. The barge canal terminal is not equipped to handle all freight vessels coming to the port of Buffalo. It can handle any vessel that can get in the slip. They can't handle grain at the terminal; they can handle package freight. Raw material can be handled over the top or side of the boat into the slip—very economically handled, such as ore, iron, steel products—they could be handled right over the side of the vessel or the boat. I am familiar with industrial conditions in Buffalo. Iron ore and coal is used largely there.

"Q. Now, in your plan for the development of the barge canal terminals what other developments are now contemplated?

"A. Terminal developments?

"Q. Yes.

"A. Based on the present terminals that are under course of construction at the present time, the construction or the control of grain elevators to handle grain at Buffalo—you are talking of Buffalo only, I presume.

"Q. Yes; that is all. Is that all, Mr. Walsh?

"A. Yes.

"Q. You are satisfied you have covered the ground?

"A. Why, as far as Buffalo is concerned, I guess that is all."

222

Recross-examination:

I did not mean to say that the State gives free storage, free transfer, and furnishes men to make the change from the boat to the car and vice versa; I said men to operate the mechanical appliances. We give the free use of the machinery there. That was done by myself and my predecessors—not by the canal board. As to whether I think that is a fair deal, for instance, towards the farmers of northern New York whom you say are not interested in any way: The farmers of northern New York are interested. They are interested in shipping between other ports in the State of New York outside of between New York City and Buffalo. They ship between Whitehall and New York. I do not see how farmers in St. Lawrence County would be interested in New York. I presume the railroads of the State pay quite a large percentage of the taxes of the State. The canal is a competitor of the railroad. I do not think that the railroads have ever been asked to contribute free storage, free machinery, and labor to handle machinery to their competitor. The State has to build these warehouses; it has paid for the machinery that is there; it has to pay for all the repairs; and the State has to pay the men that handle it. All this has to be paid by the money collected from the taxpayers of the State, and the railroads are unquestionably large taxpayers of the State.

"Q. Now, do you think it is fair, Mr. Walsh, as a public official, to compel the railroad company to contribute to the support of this free service in business to our prejudice?"

"A. In the manner you mean as taxpayers?"

"Q. Yes.

223

"A. Yes, sir; I do."

(Witness excused.)

Mr. FRANK E. WILLIAMSON, called as a witness in behalf of complainant, being duly sworn, testified as follows:

Direct examination:

I have been a resident of Buffalo for 6 years, and have been connected with the chamber of commerce as traffic manager the same length of time. To some extent I have made it my business to familiarize myself with the industrial situation in this city. In connection with my work with the chamber of commerce, the industrial end of it is not so much my work as the transportation end. I have some knowledge of the transportation facilities in this city. By reason of my acquaintance with the flow of traffic to and from Buffalo, I would say that the density of the industrial development is at Black Rock, along the Buffalo Creek Railroad—the Black Rock district. I am familiar with the location of the Erie Basin terminal and the Ohio Basin canal terminal in relation to the Black Rock district. The most convenient canal terminal to the Black Rock district is the Erie Basin. The most convenient means of switching carload traffic from that section for a canal movement would be by the New York Central to the Erie Basin terminal. If the

switching services were not adequate for the industries in that section of Buffalo, I would say that they would be deprived to a considerable extent of the benefits of the canal system; that it would necessitate a movement of their freight via motor traffic to this terminal of any business that they would care to move in connection with the canal. I have been officially advised by motor-truck owners and operators that the overhead expense of a 5-ton truck is \$25.00 a day. (On motion the last statement was ordered stricken out.)

As to whether from my interpretation of New York Central Buffalo switching tariff 1018 I can say what the switching charge from the Black Rock district to the Erie Basin terminal would be: I have no knowledge whatever and am not familiar with the tariff.

Cross examination:

I have never done any trucking myself. We have information as to what it costs to operate a truck. To a certain extent I have kept track of that myself—personally. It was the Erie Service Company truck. I couldn't give you the number of the truck as they operate several trucks between here and Rochester. I am not an officer of that company. I don't work for that company. Of my own knowledge, I don't know how many gallons went into the truck when it started or how many gallons per mile it took to operate the truck. I should judge the Black Rock district is about 4 to 6 miles from the Erie Basin. There may be and there may not be a reason why a canal terminal should be established in the vicinity of Black Rock. I wouldn't say that 50% or more of the industries of Buffalo are not located on a railroad at all. I would say that 75% of the manufacturing plants were located on a railroad or on a water terminal. I am answering you to the best of my judgment.

Those that are not located on a railroad have to truck entirely. I came from Cincinnati here. I have been working for the chamber of commerce since October, 1913. I started service with the chamber as soon as I came here.

Redirect examination:

I was called here by the people of the chamber of commerce as an expert tariff man.

(Witness excused.)

Mr. F. W. BURTON was called as a witness in behalf of complainant, and being duly sworn, testified as follows:

Direct examination:

I am traffic manager of the Rochester Chamber of Commerce and have been in that position since June, 1919. Prior to that I was assistant manager of the Minneapolis Traffic Association for 9 years. I was called from that position to my position in Rochester. The city of Rochester is interested by the construction and operation of the Buffalo terminal to this extent—that there has been in

the past a movement of freight from Buffalo to Rochester and from Rochester to Buffalo by the old Erie Canal, and during the last year there has been a movement of commodities from Buffalo to Rochester, and in the future we anticipate there will be a still greater movement when the barge canal terminals at the two points are completed. During the past year there has been an extensive movement of lumber from Buffalo to Rochester, and during the coming year, I understand contracts have already been made for the movement of lumber via canal to Rochester.

226 I am familiar with the traffic situation in the city of Rochester. Traffic in considerable volume at the present time moves between the city of Buffalo and the city of Rochester by rail. I assume it is the situation that traffic is brought from industries or manufacturers in Buffalo having direct rail connection with the New York Central. I am not familiar with the particulars of the movement at Buffalo, but there is a general movement which nearly everyone understands. I am here because of Rochester's interest in the outcome of this case, as the same questions that have arisen here in connection with the Buffalo situation are undoubtedly coming up in connection with the new terminal at Rochester. The Chamber of Commerce of Rochester, whom I represent, considers that this question is of interest to them because it affects the manufacturers and shippers of Rochester.

Cross examination:

I do not know about the individual location of the concerns that ship lumber that I spoke of being located in Buffalo or Tonawanda on the river, lake, or canal.

(Witness excused.)

Mr. B. E. FAILING, called as a witness in behalf of complainant, being duly sworn, testified as follows:

Direct examination:

I am employed by the State engineer as senior assistant engineer, and have charge of all work of the State engineer for this
227 end of the State, including the city of Buffalo. I have charge of the construction of the barge canal terminal shown on Exhibit 1. I have been an engineer 22 or 23 years. I have been employed by the State for—take it in all about 22 years—20 years. Always as an engineer. I have been connected with the barge canal terminal shown on Exhibit 1 for three years. I recognize Exhibit 7, which was made under my direction. What appears to represent two piers on that are two piers—they are barge canal terminal piers. Following your finger that is a southerly direction. The double lines there represent tracks of the Grand Trunk. They run towards the Exchange Street depot. I have seen freight traffic proceed over those tracks. It proceeded safely and without hazard. Those other lines you call my attention to represent railroad lines. I have seen traffic proceed over those lines without hazard or difficulty. Going

southerly, the lines you call my attention to are railroad lines. I have seen traffic proceed over those lines—freight traffic. Referring to the other set of parallel lines you now show me: I have not seen traffic proceed over those lines. I have seen traffic proceed over the four parallel lines you refer me to. That is the main line of the Falls branch of the New York Central. The traffic proceeded safely. Passenger trains were the only trains I saw go over those tracks. They were going about 15 miles an hour. Going easterly and following the 4 parallel lines of which I have just spoken, I have marked it 2.38% grade. That indicates the grade either down hill or up hill—up hill going towards the Falls and down hill going into the city. When they round this curve they are coming
228 down hill—going from the Falls—going down hill west of the State bridge.

“Q. Are they coming down at 2.38 per cent grade when they round this 17-degree 45-minute curve?”

“A. The bridge is, the ground is higher upon the railroad slope both ways from the bridge in this particular case, this grade leading up over the canal.”

The scale of that map is 50 feet to the inch; that is the same scale for Exhibit 8 also.

(Witness excused.)

Hearing adjourned until January 29, 1920, at Albany, N. Y.

HEARING AT ALBANY, N. Y., TUESDAY, FEBRUARY 24, 1920

Before Charles B. Hill, chairman; Frank Irvine, Thomas F. Fennell, Joseph A. Kellogg, commissioners.

Mr. J. W. PFAU was called as a witness for respondents, and being duly sworn, testified as follows:

Direct examination:

I am at the present time in the employ of the United States Railroad Administration. Before the United States Government took over the New York Central, I was in its employ. I was in the employ of each of these parties as engineer of construction
229 in charge of all new construction work on the New York Central, Buffalo and east. I was in the employ of the New York Central about 20 years. During that period I have been familiar with the situation at the Erie Basin with reference to railroads. I know where the property that the State took over from the railroad is. I know the proposed connection that they have made or desire to make with the New York Central at that point. Generally, with respect to the situation between Black Rock and the tracks which terminate south of the Erie Basin: There are two main tracks with numerous passing sidings from which are taken off various industrial sidings. At a distance of about a mile and a half north of Slip 3 there are a couple of sidetracks

used as storage yard tracks. The business handled south of the proposed barge canal connection is mostly collected and sorted on these two tracks above referred to. All of the main line traffic going north out of exchange station and coming south into exchange station passes over Slip No. 3 on the two main tracks at that point. Immediately south of the two main tracks there is a short stub track which originally was part of the main track, and it is from this stub track which the barge canal terminal facilities have been connected to. The roads that make use of the New York Central tracks from Black Rock station or the International Bridge down by this proposed connection are the New York Central, the Michigan Central, the T. H. & B., and the Grand Trunk. I think that is all. Over that line, there are, normally, about 50 passenger trains a day each way. When the Government took over the operation of the road, that number was decreased temporarily to, I think, 230 about 35 trains each way. There are industries located south of the proposed point. There is the New York Central freight house, the Thornton & Chester Flour Mill, the Exchange Elevator, the Monarch Elevator, and the Evans Elevator. Those tracks are used the most during the open season on the Great Lakes. As to whether or not the lines are congested between Black Rock and by the point in question: About 10 years ago the board of directors of the railroad authorized a survey and the purchase of the necessary land for four-tracking this district extending from Black Rock into Exchange Street. The negotiations were started with the State for the necessary land at the pumping station which is one of the tight points, and negotiations were also started with the land board for the necessary lands under water in order to get these additional facilities. These negotiations are still pending, but are very near completion at the present time. When that is done, it is proposed to four-track, using the third track now across Slip No. 3 and building an additional track either to the east or to the west as our detailed negotiations will indicate to be the cheaper. As constructed by the State, connection is made with our switch track, which is proposed to be the third track. The effect that that would have on our proposed four-tracking of the road at that point, in case it should be used as desired by the State, would be that the third track would become our main passenger track and it would mean that industrial switching would have to be eliminated. Assuming that the third track would be used in any event to reach the dock, and as to what protection would have to be taken there, or 231 what effect would it have on the main line track, and also the track reaching down to these other industries: It would be necessary to install an interlocking tower, and while switching movements were being carried on with the barge canal terminal through passenger trains would have to be held up, which would undoubtedly result in delay to the through passenger business. Industries south of Slip No. 3 would not be very seriously affected

as the main track leading to the Terrace branches to the east at a point about 250 feet south of Slip No. 3 and the portion south of that would remain almost purely freight. Such an interlocking proposition would cost in the neighborhood of \$150,000 in round numbers. The cost at present is about \$5,000 a lever; that is, after you get the tower up.

"Q. I call your attention to map 7 (doing so), with reference to the curvature of those tracks as compared with the curvature of the track that has been built by the State, and ask you when those tracks were built, whether they are recent or ancient construction?

"A. Practically all of the industries south of Slip No. 3 were installed over ten years ago."

At that time we were allowed to install 20 degree curves on industrial sidings, and at the present time the rule is twelve degrees with permission in extreme cases to go to 15 degrees. The change has been caused by the fact that the cars, for instance, are getting so much heavier it is necessary to build heavier engines and with the increased weight of the engines it is impossible to operate them over small curves. The increased weight of the engine and the increased wheel

base both go together. The increased wheel base is really

232 what does it, but that naturally follows the increased weight. I believe that they have designed the State yard to hold about 40 cars, although the lay-out is not completed yet on the ground. They could take either 4 or 5 cars in there at a time dependent upon the size of the car and the use they made of the present stub track. I know of an agreement being made between the State and the New York Central as to the Erie Basin.

(Copy of agreement received in evidence as Respondent's Exhibit No. 2.)

As far as I know, that is in effect at the present time.

(Copy of agreement made on May 22, 1917, between the New York Central and William W. Witherspoon, superintendent of public works, received in evidence as Respondent's Exhibit 1.)

That agreement is in force and effect now. So far as I know that has not been revoked.

Cross-examination:

Referring to Exhibit 7: It is true that at the present time during all seasons of the year switching operations are being carried on over these spur tracks indicated on that exhibit. Cars are being spotted within the premises of private owners on practically all the tracks. I can not point out any particular track where cars are not being spotted by our switching engine within these private premises I referred to, either during the last year or during 5 years back. I was at Buffalo the week before last and went over the ground and noticed very few of these tracks were cleaned, which indicated

233 that they had not been used for some little time. I could not now point out just what tracks they were. This was before the extraordinary congestion existing in Buffalo due to the storm. There

was only one "the" storm so far as the railroad was concerned. I was looking at the tracks about the middle of January. It has been storming in Buffalo ever since that time. In the expected development of these tracks concerning which I have testified, I stated that this development would not interfere with the present layout of the spur tracks south of a point about 300 feet south of Slip No. 3—about half way between Piers Nos. 2 and 1, as shown on Exhibit 1.

Redirect examination:

I am not an operating man and had nothing to do with spotting cars. The modern switching engine is designed to operate over curves of a maximum of 12 degrees.

Recross examination:

I could say that modern switching engines cannot be operated with safety over any of the spur tracks shown on Exhibit 7. I have never, in my 20 years' connection with the railroad, seen the modern U-type engine operate over any curve over 15 degrees. U-type engine is the present heavy switching engine being built by the Railroad Administration, which probably will be adopted as a standard by the railroads after they go back to private control. I don't know the wheel design of those engines. This U-type engine is not the type that is exclusively used by the New York Central at this particular point at the present time. The engines now

234 used at the points indicated on Exhibits 1 and 7 may be operated safely over all curves indicated on those exhibits. At the present time it is my expert opinion that it is perfectly proper and feasible to operate the switching engines available at the points indicated on those exhibits. They are being operated over those curves now. With the old switching engines, it is perfectly safe and perfectly feasible to do so. I could not say with how many types of switching engines we operate at this point at the present time. You are taking me out of my province by asking me how many different types we operate on the New York Central at the present time. In the development of the plan to which I testified, we have submitted copies to the land board with the request—. As an engineering proposition we have one complete plan finished and approved by the operating department. I have not a copy here of that plan. The proposed plan does not affect any track work south of Genesee Street.

"Q. Then the only spur track that I assume you have eliminated on this proposed design is the State spur track, is that so?

"A. We do not consider it exists."

As far as our present study has gone, everything else is left to stand as it is.

Redirect examination:

This design for this work and improvement was started about 10 years ago. At that time the New York Central owned this Erie Basin property. Our plans were not made at all in anticipation of

235 the State acquiring this property. I know of land being acquired at different points between Black Rock and Buffalo for the purpose of switching. These lands have been acquired from time to time in the last 10 years. Engines do wear out. As our engines wear out they are replaced with modern ones. All these old engines operating there will undoubtedly in time be supplanted by modern engines. For that reason if they are going to operate over the tracks the tracks should be built so that it will be safe to operate over them.

Recross examination:

I helped Mr. Kittredge in his preparation of the case of the New York Central against the State of New York. The data in that case was prepared under my direction. I believe I do remember that we ran out an angle for the laying out of the track by the sea wall strip of property on the lake front. I don't recall that the curve there was one of about 135 feet radius. I don't remember whether or not that curve was around 40 degrees or 42 degrees as shown on that layout.

(Motion made to strike out testimony in last paragraph and motion granted.)

(Witness excused.)

Mr. DANIEL W. DINAN, called as a witness on behalf of the respondent, after being duly sworn, testified as follows:

Direct examination:

I live at Buffalo and am employed by the Railroad Administration as general superintendent, second district. That district
236 covers from Bay View, just west of Buffalo and Suspension Bridge, to Minoa on the east, and north as far as Massena Springs and Norwood, and south as far as Cherry Tree, Pa. That includes the territory of the city of Buffalo. I am familiar with the Erie Basin, from a railroad point of view, and have known it nearly 3 years. I know a track has been constructed on the Erie Basin property for a barge canal terminal. By a switch leading to our switching lead on the south side, alongside our main track, I would say they connect with the New York Central. I have not checked the capacity of the tracks constructed by the State on its land personally, but I understand there is room for about 40 cars. The track they connect with is what I call a lead, crossing Slip 3. I would imagine about 7 cars could be taken on this lead at one time—when the lead is clear. When the P. & R. coal trestle is doing business, they generally have 2 cars standing on the west end of that lead, which would leave room for an engine and 5 cars. The P. & R. coal trestle is in operation during the navigation season on the Great Lakes. It is known as the Philadelphia & Reading trestle and is used for transferring anthracite coal from cars to lake vessels. That comes from Philadelphia & Reading region principally; some from other railroads. During the summer season, this trestle is a

pretty busy place. There is a large quantity of coal handled there—I haven't the tonnage figures. South of the point where this connection is to be made, there are 3 grain elevators, the Exchange, Monarch and Evans elevators, the New York Central flour house and freight house, and there is a milling concern—Thornton & Chester; and the Grand Trunk have a freight house in there and they also have one or two team tracks. The grain coming to these elevators
237 generally comes in in lake vessels. I am not sure if the flour mill has a lake dock or not. The flour that the New York Central gets from its flour house comes from lake vessels principally. It is ground up in the northwest as I understand it. They have their own freight station there, which serves quite a territory in that neighborhood. It is not far from the retail territory places in the city, and the Grand Trunk also has a freight yard there. The business done there in the summer time is more than double that done in the winter. I would say that this proposed switch connection of the State would interfere seriously with the other business in that neighborhood. It would mean nearly a continuous movement if there was 40 cars each way a day there, to and from the dock—they would have to be taken in and out in 5-car pulls—they would have to be moved to the storage tracks near Tower B in 5-car pulls. At Tower B these storage tracks are nearly a mile and a half from this point, north of it. I believe that would occupy the tracks a good portion of the time. The passenger traffic has to pass, on the main tracks, right by this proposed point of connection. The passenger traffic is less since the Government took the road over. At the present time there are about 29 regular trains in each direction, and I would say there is an average of 8 to 10 extra sections per day in each direction. I have some time tables showing the traffic there before the Government took it over—lated November 26, 1916, October 31, 1915, and November 23, 1919. The first time table shows 44 regular passenger trains westbound and 42 eastbound.

In addition to that there were about the same number of extra
238 sections, perhaps more in the excursion season when we are handling excursion trains. I would say before the Government took the road over, there were 50 passenger trains each way a day. By this particular point, besides the New York Central, the Michigan Central, Grand Trunk, and Toronto, Hamilton & Buffalo, operate trains. When I gave the number of trains I gave the total number of trains—not merely New York Central trains. In addition to the passenger trains, the Grand Trunk operates 2 freight trains in each direction per day, and the Michigan Central 2 regular freight trains per day in each direction.

The track going into Pier 1 shows a curvature of 21 degrees on the north side of Pier No. 1. Down in that territory now, we use what we call a Class B-2 engine, which is not a modern type. The tracks that were laid in there south—appearing on Exhibit 7—were laid before my time in Buffalo. I would say that a modern type switch engine could not operate over these tracks and over the tracks

proposed by the State in safety. The railroad has refused to operate over tracks with a curvature of that kind at other places besides that in the State—for the Dunlop Rubber Company's proposed siding on the Wonalancet Branch in Buffalo. I understand that is to be one of the largest rubber plants, producing plants, in the world. They are to construct their own tracks; they wished to use a 20 degree curve, and we explained to them that we could not and would not undertake to operate with a 20 degree curve with our power and crews, and they told us they would furnish their own power and crews and operate the plant entirely themselves, and this was satisfactory to us. The modern type of switch engine, as built by the Railroad Administration, is known as U-3, Class U-3. I

239 I have seen the type of engines the Grand Trunk uses in there; I would say it was 0-6-0. Saddleback, we call it; very small

light engine. I know of the proposed improvements by the New York Central in this territory in a general way; I had the plan a short time ago from Mr. Pfau. I heard of it, I would say, shortly after the time I went to Buffalo. Under the proposed plans, this track we are making connection with would be used for one of the main tracks. In order to use it as a main track, and the effect that would have of switching into the State basin, we should put in an interlocking plant there, and this would cause delay to other trains switching and cause delay to the trains. As to the traffic in south of there, I would not say it would delay that seriously, as the main tracks will swing north just south of this point.

The canal is a competitor of the New York Central. I would say it is a competitor, or at least it will be some day, practically across the entire State from Buffalo to Troy. There are some towns through the central part of the State it does not touch, but it touches the principal cities—Rochester, Syracuse, Utica, Albany and Troy. It does not touch Batavia as I understand it.

Mr. SPRATT. We are speaking of the main line of the Central.

When I speak of main line tracks, I mean main line running between Buffalo and Suspension Bridge. At the International Bridge, this line connects with the Grand Trunk, and with the Wabash through the Grand Trunk, and with the Michigan Central. Then it runs on to Suspension Bridge or Niagara Falls where there are 2 bridges over the Niagara River; one known as the Michigan Central bridge and the other as the Grand Trunk. There we make connection with all the Canadian lines coming there. With the excep-

240 tion of the line through the streets of Tonawanda and North Tonawanda, it is a double track road between Buffalo and Suspension Bridge. In some places there are 3 main tracks, so that it is a busy stretch of road.

Cross-examination:

I would say that 80 cars a day in and out of the barge canal terminal shown on Exhibit 1 would cause congestion on the main line of the Niagara Falls branch of the New York Central. Forty cars would cause one-half the congestion of 80 cars. I would say

that 40 cars would not make it unsafe to operate if it was properly protected. I would not like to say 40 cars would make it unsafe—just as it exists to-day. I would say it would be feasible to the detriment of other business. As an operating man, I made it my duty to become familiar with the operations carried on over the tracks indicated on Exhibit 7. I would not say that there is any one of the spur tracks indicated on Exhibit 7 where 40 cars are taken in and out each day. I would say the maximum amount of traffic over the spur leading to the Thornton & Chester flour mill was not over 2 cars a day; to the spur leading down to the New York Central freight house, about 20 cars a day. As to that group of spur tracks leading, some in the general direction of the Exchange Elevator: We operate over only one of those tracks, and on that the maximum amount of traffic would be about 8 to 10 cars per day. I never operated the Niagara Falls branch as superintendent; it is under my general jurisdiction. We have found such operation there feasible; we have had some derailments in there. I would not say it had reached a margin where it was no longer safe to carry on this operation. I would say that the Erie Canal is a competitor of the

241 New York Central, or would be some day. As an employee or officer of the railroad, my duties in dealing with competition are not very much. I would say I have not conceived it my duty in Buffalo to take preventive measures where competition has developed; that is for the traffic department. As an operating man, I can't recall just now doing anything in regard to competition. I do not recall offhand that George W. Maltby & Sons Company recently submitted for my approval a layout of a switch leading to the barge canal location shown on Exhibit No. 1. There is a local superintendent under my jurisdiction by the name of Mr. Emery. If you can point it out on the print, I may recall that Mr. Emery spoke to me in regard to the Maltby Company's switch; I can not recall it offhand.

"Q. Now, as an operating man, will you please indicate to me on Exhibit 1 some constructive criticism as to what the State ought to do there in regard to the layout leading to their terminal?"

"A. I am not an engineer; I would like to be excused from that."

I could not say that any modern type engines, as I have described them, operate between the points you indicate—in that particular territory. As a matter of fact, I would not say that the switching engines we are using down there are switching engines which we deem safe and feasible for use over a 21-degree curve; they were not designed for that degree of curvature. As a matter of fact, they are actually being used over such curves, and they are being derailed. I could not say offhand how many derailments we had during the last year. There was no such condition in regard

242 to derailments there as led to any action on my part in order to minimize or eradicate the evil, except to keep the modern engines out of that territory and to maintain the tracks in good condition. I can't recall offhand what curvature we have over the Y

on Lewistown Heights. I think 15 or 16 degrees; it may possibly be more than that. I know we had several derailments there. We have had some derailments in this territory in question. I can not recall any others due to curvature at the present time.

The coal trestle I spoke of is up in here [indicating]. My recollection is that is about 600 feet from their connection with our switching line. I think it is shown on one of these maps. With 2 cars standing at the trestle, we can only put 5 cars and an engine in 600 feet. It has not been necessary to keep 5 cars and an engine and two cars standing at the trestle there all the time, but the two cars at the trestle are kept there practically all the time when the trestle is in operation. That leaves room for the 5 cars and the engine. An ordinary car takes up about 40 feet; I may be mistaken as to the length of that, but I believe there is a map here somewhere that shows that. A switch engine would ordinarily be about 75 or 80 feet. I think I gave the length (of 600 feet from connection to switching line of New York Central) as too long. We sized it up on the ground the other day, and we figured with 2 cars standing on the end of the track at the trestle there was room for 5 cars and an engine. It would be about 400 feet as shown on the map. Five cars would be about 200 feet and the engine would take about 80 feet more. The other cars would be 80 feet more, which would be 360 feet, leaving 40 feet. The

other two cars are kept standing by the trestle to load screen-
243 ings from the trestle. I don't know positively that between January 15 and February 13 of this year our switch engine placed a carload of door fittings for the Ogden Company at the inshore end of the freight house at the track leading to Pier No. 1 as shown on Exhibit No. 1; I was not there at all times.

I have instructed the superintendent not to place cars on your tracks shown on Exhibit 1 until further notice. I gave such an order because we did not consider it safe operation. I would not say we are operating over exactly the same kind of curves, all through there, as shown on Exhibit 7. I understand we are operating over one curve of greater degree than the one leading into your yard. I have not measured the curves myself. As to why I should order our switching engine to stay out of your yard when we go into other yards with curves of greater degree: In the first place we have no agreement covering that operation. We do not operate any side tracks without an agreement covering the same. I would not say that was the only reason we refuse to operate over that track; I am instructed not to place cars on that track. Personally, I have not been requested to place cars on that track—nobody made a personal request of me to place cars there. I don't know if somebody made a personal request of some subordinate of mine.

Redirect examination:

We have never refused to tender cars to the State at the point where they could interchange them, at the point of interchange;

that is set them in there, clear of our right of way. Our instructions permit us to do that. We refuse to go in with switch
244 engines and operate in on the State property. I have heard there was a law forbidding us doing that; I am not familiar with that law.

Recross examination:

"Q. Now, as an operating expert, can you give me any reason at all, simply as an operating man, understand, why it is not just as feasible and safe to go into our yard with the facilities you at present have at this point as shown on Exhibit 1, as it is to go in on the spur tracks shown on Exhibit 7?

"A. We do not go into all the spur tracks.

"Q. Well, I mean in on the spur tracks you do go into, then.

"A. Into any spur track?

"Q. Well, isn't it just as feasible to go into the ones on Exhibit 7 as it would be to go into ours; now, as an operating man?

"A. Not all of them; some of them; yes.

"Mr. SPRATT. You mean physically?

"WITNESS. Physically."

The curvature is less into your yard than it is into one of the other tracks.

This is the yard of the Grand Trunk Railroad [indicating], there is the Exchange Elevator [indicating], this is the freight house of the Grand Trunk Railroad. Over here [indicating] is the D. L. & W. We spot cars for the Thornton & Chester flour mill on that connecting track. That is not the universal practice of the railroad with such connections. It is not the practice with the Donner
245 Steel Company of Tonawanda. It may be that it is not the practice where the yards are so large, and the business is of such large volume, that it is practicable for the shipper himself to furnish his own spotting engine. The shipper may have other reasons. Where it is not convenient for the shipper to have his own spotting engine by reason of the small size of the connecting track or the small volume of business, for the ordinary volume of business we do it practically universally, except where the business is of sufficient value to warrant doing it otherwise. Some other condition may make it necessary—extreme curvature of the tracks.

Redirect examination:

I presume that spotting for Thornton & Chester Milling Company, for example, is part of our rate, but the traffic people can answer that better than I can. I presume we get the long haul at the Thornton & Chester Milling Company; I could not say positively. I would say as a practical proposition that it would be possible for the State to operate these cars on its own switch tracks there by a separate locomotive, if the tracks were properly constructed. As they are constructed, they could by using our tracks. It would not be a practical thing to do the switching to-day that we are insisting they should do with their cars by their own engine, without con-

structing a lead or using a lead. I mean it would not be practicable for the State to operate its own engine unless it used part of our right of way some of the time or changed its track layout. I would say their track layout could be changed so they could
246 have their own engine do their operating without using our tracks for switching, but I believe the engineer is better qualified to answer that than I am. From an operating standpoint I would say that there is objection to delivering cars at the interchange point to the State, anyway at that particular point, because of interference with other traffic at that point and also because we intend to use that track for a main track.

(A paper was marked, "Complainant's Exhibit 10," for identification.)

Recross-examination:

I believe I recollect complainant's Exhibit No. 10; I saw a carbon copy to-day. That is copy of a letter which the superintendent of the Mohawk division wrote to the superintendent of public works for the establishment of a connection at Troy, N. Y. I signed it. It was April 10, 1917. At that time I was superintendent of the Mohawk division of the railroad. I did not establish a connection at the barge canal terminal at Troy, N. Y., at that time. I did not later on. Our engineer estimated the cost at \$3,400. I don't know if later on the railroad actually did establish that connection. I left the position as superintendent of the Mohawk division on May 1, 1917. It was shortly after April 10 that I went to Buffalo.

Redirect examination:

The connection at Troy was not made in my time. I don't know who built it; I don't know if it was built. It was an engineer's estimate of what it could be built for by any competent person.
247 (Witness excused.)

Mr. E. H. CROLY was called as a witness in behalf of the respondent, and being duly sworn, testified as follows:

Direct examination:

I live at Buffalo, and am now in the employ of the United States Railroad Administration, as assistant general freight agent. Before the Government took over the road, I was in its employ as assistant general freight agent, which includes the territory of Buffalo. I have been in the employ of the New York Central more than 40 years; about 4 as assistant general freight agent. I am familiar with the Erie Basin and the freight territory in Buffalo generally. The New York Central has 5 freight stations in Buffalo. The freight that is tendered to the road or received from the road in less than carload lots, is handled by draying it to various freight houses—trucked there. A very large percentage of the industries in Buffalo have no rail connection whatever. That freight is

trucked to the freight house or the team tracks of the various railroads. I am acquainted with the Larkin plant. It is located on a railroad. It has no water connection. I am acquainted with the Donner Steel plant. That has water connection, as well as rail. I am acquainted with the Aniline Dye Company. It is on the Buffalo River. It has water connection if they want to use it. I am acquainted with the Rogers-Brown Iron Company. They have water connection as well as rail. I think those were the
248 only concerns that testified up there so far as I recall. There was only one of them that did not have water connection of those that testified if they wished to use it, and that was Larkin Company.

I know of no reason why the State or any party could not gather up freight from these different points and bring it to a common dock at the Erie Basin by boat in the summer time—that is, from all industries on the water front. We have 2 groups of switching rates in the city of Buffalo. One is a reciprocal rate to and from connections and the other is an industrial switching charge between 2 industries. The reciprocal rate is between railroads; that is, it is based on us giving about as much as we receive. Between switching plants it is based upon both industries being located on our tracks, patrons of the company, and there are cases where they desire to exchange material or send material to one point for further manufacture and we expect to get another haul out of it after it has been completed. I know of this proposed connection by the State with the New York Central at Erie Basin. The Erie Canal is a competitor of the New York Central.

We compete or can compete with the New York Central at all of the principal points between Buffalo and Troy. I think that connection would deprive us of a considerable traffic which we are now carrying. There would be no reciprocal benefit whatever to the road. In other words, taking freight going to Albany, for instance, we get the benefit of the long haul to Albany. If we delivered it to the dock at Buffalo, say, from the Larkin plant, we would
249 just get the haul across the city. It is more expensive to carry it through there than it is after you get it out on the road. The money is earned from the road haul. We do not think we earn any money whatever from the switching service. In this event we would have the worst end of the haul, and give the profitable end of it to the canal, to the boatmen. Where we have interchange with the railroads themselves, we do not get a proportionate part of the haul in the switching charge, only wherever there are competing points, the railroad rates are on a level; we are not asked to switch any more freight to a competitor than we receive from them, so that we generally even up on it.

“Q. Now, state whether taking the traffic in less-than-carload lots, whether that would be profitable hauling to or from this barge canal terminal.

"A. I do not understand that we would be asked to handle less-than-carload freight.

"Q. Well, some of these men who testified expected you would handle everything, so I am just asking you that question.

"A. Well, I should not think that would be a very attractive proposition."

Cross-examination :

As a traffic expert, I should think there would be very little profit in splitting westbound boatloads at Buffalo into cars, freight cars; they are not likely to unload their boatloads and give that to the railroad for further shipment west. I should think they would pick up the traffic mostly in ships that continue on in that

250 direction. In the same way I should think the eastbound water traffic would probably continue through the canal, instead of splitting it at Buffalo. What is actually going to happen in my opinion is that there is a lot of traffic that is now in Buffalo loaded on to the cars and taken directly, the long haul, either east or west by our railroad, and instead of doing that they will have you take it that short shift down to the terminal. The canal will get a good deal of that business, either east or west. I don't think they will get it west; they will get it east—the canal will get it.

"Q. Stuff coming to Buffalo either from the east or west will come into the terminal and then, loaded on freight cars, you will benefit—

"A. Not from the west, from the east."

A good deal coming from the east will come into Buffalo to be unloaded there at the terminal and then to be put in our freight cars and switched around the city of Buffalo for use in Buffalo—to our detriment. I would not say to what extent the barge canal terminal at Buffalo will develop. With canal rates as low as they are compared with rail rates, if a shipper is located where they can get additional facilities by the use of the canal without charge, it would certainly be our loss. If you followed that system, a considerable business is sure to develop there. If you could relieve the shipper by this, I should imagine that considerable business is going to develop at your terminal by the use of our shifting arrangement, but we would lose more than we can afford to at the present time. That

251 is my carefully considered opinion. We don't fear the success of the canal scheme. All we ask is that any person who wants to use the canal, if they will take their stuff to the canal by truck instead of asking us to furnish the facilities for doing it. If they are going to deprive us of it they ought not to also force us to take it over there and give it to them—do the switching. I don't think there will be any hardship on those particular industries who are located on the track, for the reason there are hundreds who are not located on the tracks at all who haul now by truck to the railroads. So it certainly could not be any very great hardship for one of those industries to haul to the canal and pay the haulage charge

on account of the low rate they are going to get as compared with the railroad.

Referring to Exhibit 7, indicating the New York Central freight house: All commodities that come in in gondolas and freight cars and so forth are hauled away by trucks. A large amount is brought into the freight house by truck. All that is shipped out is hauled in there by trucks. Of course, all that comes in in cars is hauled away by trucks. I imagine there is in the neighborhood of 20 to 25 cars a day loaded at that freight house and brought in from the city by truck. I don't think the switching rates are remunerative to the company. We don't switch between our five terminals in Buffalo. We regularly switch between manufactories and terminals, and to all our five terminals. We get the long haul on that. I stated that of the five industries represented by witnesses at Buffalo all but one of them, the Larkin Company, had water facilities. The Donner Steel Company has water facilities at the present time on the Buffalo River. As to whether it is practicable to take
252 barges of the type used on the State barge canal up the Buffalo River to the Donner Steel Company works and there load them during the season of navigation: There were a number of them loaded there last season. I don't know what dock facilities the other industries mentioned have to take the barge canal barges to all those industries and have them loaded there; I don't know anything about their dock facilities. I certainly do know about the dock facilities of the Donner Steel Company. I know Rogers Brown have dock facilities. They are sufficient to take care of the barges from the barge canal.

Redirect examination:

The rates the railroad charge last the year round. It certainly does cost more to operate our road in the winter than in the summer. We cannot adjust our rates to the summer time as the barge canal can. We have to have equipment to take care of it in the flush season as well as in the season when there is little moving. There is considerable traffic in and out of the point south of where this proposed switch terminal is—grain and flour and feed. The Pillsbury people send a large lot of flour down for the eastern market. It is handled by the River Street flour house. There are 3 grain elevators there. The New York Central has quite a large local freight office there. I think Buffalo is practically a level city with very few hills, and I don't know of any better city in the world to do trucking in. I think the amount of freight that might be offered the canal could
be well handled by truck. A few years ago Buffalo advertised
253 to have more smooth paving than any other city in the United States.

Recross examination:

Of Larkin Company's business that the New York Central receives, not a very large portion of it is trucked to any New York Central terminal in Buffalo. They have tracks into their terminal.

As a matter of fact, all of their carload business moves in switching service, and their less than carload business almost entirely in a ferry car service. That is true to a great extent of all of the large Buffalo industries. There has been substituted for the old-time draying method a ferry car of 10,000 pounds minimum to the nearest New York Central or other railroad station. We substituted it. We provided facilities for them. Under present conditions, if we were to subject and Buffalo shipper to the inconvenience of draying, it would not be a departure from their settled custom as to any one business. I wouldn't say most of their business is moved in a switching service, but a considerable portion of it is. It depends on whether the business of less carload is of sufficient magnitude to provide the minimum weight that we require under the ferry car system as to whether the local portion of it is trucked. Industries of the character of Larkin & Company or any others, I wouldn't say that, in their less than carload business, they all go in a ferry car service. I think perhaps there may be a dozen in the city of Buffalo that take advantage of the ferry car service. I don't think to exceed a dozen. As to what percentage of the business of that dozen that would represent ferry car switching to them as against their
254 hauled business: The industry who is located on our tracks and has a ferry car system in connection with us is bound to draw by dray a large portion of its traffic to some one or the other railroads, going to a point that is reached either for the purpose of serving his customer or for some other reason, and the facts are that there is no industry there but what is continually draying.

"Q. Take the Larkin Company, if they wish to route any part of their business through New York State by canal, and utilizing as they do ferry car service for that territory now, to compel them to dray to the canal terminal would be to subject them to additional or undue inconvenience, would it, and expense?"

"A. They are put to the expense of —"

Their practice now is to load it at their dock and warehouse in cars almost exclusively.

"Q. To take it to the canal terminal in the manner you prescribe by draying would subject them to an additional expense?"

"A. Why are you so anxious to save them expense and not care so much about us?"

"Q. I am not asking that.

"A. That is just what it means. What you give to them you take away from us. That is the only objection that we have."

I have to a certain extent to do with making the side track agreements between the company and shippers. The question of extending side track facilities is one which is decided by both the operating and traffic departments. The superintendent passes upon it and the traffic department passes upon it. As to the general practice of the company in the conditions which are inserted
255 in those contracts with reference to spotting cars for shippers with the company's locomotives so that the shippers won't

need a locomotive, and taking the cars out: The rule is, if there is a side track agreement entered into and the customer is offered the side track facilities that the cars are spotted where he requires them. They are spotted for him and then our locomotive goes in and takes them out. That is done because it is about the only practicable way to handle the business. It is spotted for them once. Of course, if he moves it, if he has any additional movement in the yard, there is an additional charge made for that movement. He doesn't necessarily have to have any locomotive or any power to move the car or shift the car.

There are also conditions imposed about the releasing of the company from claims for damages for fires and for injuries; a great many things pertaining to the sending of an engine. And then the traffic department would not approve of the application unless the business of the concern was of sufficient magnitude to warrant the expense that we would have to go [to] in making the connections. In making the agreement, it is based very largely on the consideration that freight and long hauls can be given the company. If there is nothing only a switch movement involved, we would object to making the connection and putting the track in. We would refuse to. That is general. All subject to the operation of the interstate commerce act and of section 27 of the public service commission law.

256 The custom or practice that I described in regard to putting in sidetracks is the one uniformly used in the vicinity shown on Exhibits 7 and 1; it applies there and [to] all other points. There is not any distinction or difference in the application of this practice in the vicinity shown on Exhibits 1 and 7.

(Witness excused.)

MR. LELAND WADSWORTH was called as a witness in behalf of the respondent, and being duly sworn, testified as follows:

Direct examination:

I live in Troy, N. Y., and am employed by the United States Railroad Administration. Before that I was employed by the New York Central as freight agent. I am freight agent now. The tracks in yellow, shown on Exhibit 1, represent the tracks belonging to the State at the barge canal terminal at Troy. They connect up with the New York Central tracks at a point south of Adams Street. That map does not show the connection of the Boston & Maine. The blue print you show me shows the connection of the B. & M. Railroad with the barge canal terminal—marked "B. & M. R. R."

(The blue print mentioned was received in evidence as Respondent's Exhibit No. 3.)

The Boston & Maine is an entirely different corporation from the New York Central. It too was taken over by the Government. During the last season of navigation the New York Central did

take cars to or from the State terminal at Troy. I have a list of the cars. This shows record at New York Central freight station at Troy showing following cars in switching service from the barge canal terminal to the B. & M. Railroad at Troy during the month of July, 1919. These cars were loaded with cement. That is July.

(The list of cars was received in evidence an marked "Respondents Exhibit No. 5.")

The cement came from Hudson, and was destined to New England points, over the B. & M. This one is a record at New York Central freight station at Troy showing the following cars in switching service from the barge canal terminal to the B. & M. Railroad during the month of August, 1919.

(The list of cars was received in evidence and marked "Respondent's Exhibit No. 5.")

Record at New York Central freight station at Troy showing the following cars in switching service from the B. & M. to the barge canal terminal in the months of July and August, 1919, handled in switching service by the New York Central.

(The list of cars was received in evidence and marked "Respondent's Exhibit No. 5.")

The New York Central switched those cars due to the fact that the connection between the barge canal and the B. & M. tracks was out of commission for about 10 or 15 days at that time. That was done in a regular switching service on account of the other road being put out of business. The number of cars was 12 from the B. & M. and 23 to it. There were other cars besides those handled on the dock by the New York Central. We switched off that dock for local concerns in Troy 6 cars of cement. That came from

Hudson. That is for local delivery on team track in Troy. And one car for sidetrack delivery in Troy. There is the record.

(The list of cars was received in evidence and marked "Respondent's Exhibit No. 7.")

That is all the business the New York Central ever did with the State barge canal terminal at Troy.

Cross-examination:

We accepted every request that was made to us to switch cars to and from the barge canal terminal at Troy. We never refused under any circumstances during the year 1918 to provide switching service in and out of the terminal with our engines. The operations I have described are all I have any record of. I do not recall any others of which I have no record. These switching operations consisted of bringing our engines onto the State land and spotting the cars at the warehouse and in sending our engines onto the State land and hitching onto the cars at the warehouse on the cement dock and taking them out onto our own right of way. Any way,

we went onto the State land with our engines, and off of the State land with our engines.

That business was handled on the basis of our Troy switching tariff, 30 cents per ton basis, except for local delivery, \$3.50 a car. I think that, prior to the time the B. & M. physical connection was made, in 1917, there were some quantities of moulding sand that come up there and was handled over that dock and switched by the New York Central for Murray, but this is 1918 and 1919 that we are talking about. I didn't go into 1917 at all. I recall that in 1917 we did have some cement for Murray.

"Q. Wasn't that for the contractor? Wasn't that for a contractor, pertaining to the improvements there of the State?"

"A. No, I think that was some sand for Schenectady."

I did not know of this contract, Exhibit 1, until to-day. In sending the engine down there, at Troy, I did it in the usual course of business. I did not call it specifically to the attention of the superintendent.

(Witness excused and hearing closed.)

260 [Exhibits Nos. 6-13, inclusive.—Photographs omitted in printing.]

268 [Exhibit No. 1.—Map omitted in printing.]

Exhibit No. 2.—Comparative statement of tonnage

	Season of 1922						Season of 1923					
	All canals		Erie		Champlain		All canals		Erie		Champlain	
	Week ending June 10th	Up to and including June 10th	Week ending June 10th	Up to and including June 10th	Week ending June 10th	Up to and including June 10th	Week ending June 9th	Up to and including June 9th	Week ending June 9th	Up to and including June 9th	Week ending June 9th	Up to and including June 9th
MANUFACTURED PRODUCTS												
Iron, pig and bloom.....	1,066	9,348	1,066	9,348			965	2,747	965	2,747		
Iron or steel articles.....	3,316	9,142	3,316	9,142			1,120	1,120		1,120		
Other metals.....	2,250	2,783	2,250	2,520	263		1,584	1,584		1,584		334
Petroleum and other oil.....	5,928	33,814	5,928	28,301	5,513		23,989	20,384	6,348	20,384		3,605
Cement and lime.....	1,600	5,625		705	868		240	4,592	600	5,540	50	1,018
Brick.....	2,580	8,032	580	3,232	2,000	4,400	800	5,540	800	2,300		
Salt.....	1,071	8,484		5,730			1,200	3,600		2,300		
Sugar.....	938	18,251	938	17,180	1,071		1,425	11,289	1,425	11,119		170
Implement, vehicles, and parts.....												
Machinery and tools.....		2,161		2,156				442		215		442
Paper and paper products.....		493		250	243			215				
Textiles, boots, shoes, etc.....												
Furniture and household furnishings.....												
Oil meal and cake.....												
Fertilizers.....		2,845		2,845								
Chemicals, drugs, etc.....		5,595		4,923	672		275	2,995		2,056		439
All other.....	1,758		1,758					2,498		2,039	275	
PRODUCTS OF ANIMALS												
Hides, leather, and wool.....												
Packing-house products.....												
Meats, dressed.....												
All other.....												
MISCELLANEOUS PRODUCTS												
Ice.....	675	975	675	975								
Merchandise n. o. s.....	555	3,008	555	3,325	583		501	3,410	451	2,994	50	416
All other.....												
PRODUCTS OF AGRICULTURE												
Wheat.....	4,916	20,347	4,916	20,347			2,610	14,265	2,610	14,265		
Corn.....	2,235	4,139	2,235	4,139				17,978		17,978		
Oats.....	2,235	3,901		3,901								

Exhibit No. 2.—Comparative statement of tonnage—Continued

	Season of 1922						Season of 1923									
	All canals			Erie			Champlain			All canals			Erie		Champlain	
	Week ending June 10th	Up to and including June 10th	Week ending June 10th	Up to and including June 10th	Week ending June 10th	Up to and including June 10th	Week ending June 9th	Up to and including June 9th	Week ending June 9th	Up to and including June 9th	Week ending June 9th	Up to and including June 9th	Week ending June 9th	Up to and including June 9th		
MANUFACTURED PRODUCTS																
Rye.....	8,546	16,798	8,546	16,798			21,795	35,446								
Barley.....	3,508	5,028	3,508	5,028				6,720								
Barley malt.....																
Flour.....																
Hay.....																
Flaxseed.....	1,512	7,266	1,512	7,266			5,990	38,326								
Cotton.....																
Fruits and vegetables.....	225					225										
All other.....	169			169				19				47			19	16
PRODUCTS OF FOREST																
Lumber.....	3,517	11,550	650	2,107	2,867	9,443	4,211	12,797	500	2,908						
Wood pulp.....		2,254				2,254	350	825	350	825						
Pulpwood.....																
Shingles, lath.....																
All other.....	224			224			162	482		115						
	200					200	398	608								
PRODUCTS OF THE GROUND																
Anthracite coal.....	255	2,367	255	255		2,112	2,363	9,594								
Bituminous coal.....	800	1,785			800	1,785		1,632		607						
Iron ore.....								2,315								
Other ores.....								672								
Sand, stone, gravel.....	7,290	48,252	6,510	44,229	275	1,889	11,000	56,403	9,800	51,500						
Clay.....	2,354	4,724	1,580	2,781	774	1,943	559	6,306	800	2,038						
All other.....	286	20,847		16,413	280	4,434		590	559	2,038						
Sulphur.....	(1)	(1)	(1)	(1)	(1)	(1)		22,915		20,375						
Total.....	54,970	261,592	44,798	214,750	7,864	39,373	61,193	291,848	51,035	244,115						

State of New York, superintendent of public works, bureau of canal traffic. Edward S. Walsh, superintendent.

GENERAL CIRCULAR NO. 18

(Superseding No. 13)

To shipping interests:

For the information of all interested therein a list of the carrying organizations and individuals who express their intention of operating upon the New York State canals is given herewith, with a description of the character of service to be rendered, in accord with the latest information in the possession of this department.

The carriers named below operate equipment owned by the respective organizations.

Inland Marine Corporation, 15 Moore St., New York City. (Operated by Bullock & Galvin, Inc.) S. W. Bullock, general manager; J. F. Powers, general freight agent; M. R. Galvin, assistant general manager, 522 Ellicott Square, Buffalo, N. Y. Operates eleven cargo-carrying steamers of 185 tons capacity and 75 cargo barges of 300 to 600 tons capacity. Service embraces bulk cargo movement between Buffalo and points within lightcrage limits of New York Harbor and a carload and less-carload service from New York to Buffalo, with interchange at Buffalo with the Lake lines for Chicago, Cleveland, Detroit, Duluth, Milwaukee, Minneapolis, St. Paul, and points in Minnesota, North and South Dakota, Montana, western Canada, and the Northwest Pacific States, on joint canal-and-lake and canal-lake-and-rail rates. A limited merchandise service is furnished between Albany and Utica.

Interwaterways Line, Inc., 42 Broadway, New York City. G. Roy Hall, general manager; F. J. Keys, superintendent; W. M. Regan, general agent, 533 Marine Trust Bldg., Buffalo, N. Y. Operates five steel motorships of 1,500 tons capacity each in a bulk cargo service between New York and Buffalo.

Lake Champlain Transportation Company, Whitehall, N. Y. M. E. Finnican, New York manager, 15 Moore St., New York City; J. S. Kaine, manager, 17 St. James St., Quebec, Que. Operates under charter or ownership a number of cargo barges of 300 tons capacity and thirteen towing tugs. Bulk cargo service is maintained between New York City and Quebec, Montreal, Ottawa, Three Rivers, and intermediate ports in Canada; also to and from all ports on Lake Champlain and the Champlain division of the New York State canals.

Minnesota-Atlantic Transit Company, Alworth Building, Duluth, Minn. H. T. Hoopes, manager. Operates two Diesel electric-driven 2,300-ton motor ships in package freight service between New York City and Duluth.

Murray Transportation Company, Inc., 24 State St., New York City. Operates twelve 300-ton and twenty-nine 500-ton barges, twelve 600-ton deck-loading barges, and three tugs for bulk cargoes between points in New York Harbor and ports on or reached via the New York State canals.

271 New York Canal & Great Lakes Corporation, 27 Pearl St., New York City. E. G. Warfield, general manager; C. G. Warfield, traffic manager. Renders service on bulk cargoes between New York and canal ports and a nonbreak-bulk service to Lake Erie ports. Handles merchandise shipments between canal and Hudson River ports by arrangement, rates to be quoted upon application. Operates fifty-one 750-ton steel cargo barges, three 750-ton wooden barges, and fifteen 450-ton cargo-carrying power boats.

Rochester Terminal & Canal Corporation, P. O. Box 729, Rochester, N. Y. Edward B. Foote, general manager; W. G. Bartenfeld, New York manager, 1120 Whitehall Bldg., New York City. Operates ten 450-ton wooden barges with three power units. Shipments contracted for movement to and from all New York State canal and Long Island Sound ports. Merchandise shipments between New York and Rochester handled upon prior arrangement.

Transmarine Corporation, canal division, 5 Nassau St., New York City. S. MacClurkan, vice president; J. H. Muller, jr., general freight agent; M. L. White, general manager, 805 Chamber of Commerce, Buffalo, N. Y. Operates thirty 400-ton steel barges with five towing tugs. Service rendered comprises bulk cargo movement between Buffalo and New York Harbor ports, and merchandise service westbound from New York Harbor ports to Buffalo and west thereof, reached by lake connections on joint canal-and-lake and canal-lake-and-rail rates. Principal ports are Buffalo, Cleveland, Detroit, Chicago, Milwaukee, Duluth, Superior, Minneapolis, and St. Paul.

The interests named below, according to advices received, operate equipment owned or chartered in an intermittent service between canal ports.

Barge Canal Individual Boat Owners' Line, J. A. Ryan, agent, room 1604, 11-19 Moore St., New York City.

Barge Service Company, Inc., 12 Broadway, New York City.

Bronx Barge Corporation, foot of 152d St. and Harlem River, Bronx side, New York City. D. J. Conroy, agent.

John J. Cain, 29 Broadway, New York City.

Canal Transit Corporation, 64 Pearl St., Buffalo, N. Y.

Gustav A. Carlsen, 59 Pearl St., New York City.

Crew Transportation Corporation, Staten Island Ferry Bldg., foot Whitehall St., New York City.

William H. Doherty, 29 Broadway, New York City.

W. E. Hedger Company, Inc., 25 Beaver St., New York City.

James Hughes, jr., 29 Broadway, New York City.

James J. Kelly, 29 Broadway, New York City.

272 Bertell W. King, Whitehall Building, 17 Battery Place,
New York City.

Knickerbocker Towing & Transportation Co., 17 Battery Place,
New York City.

Murray Forwarding Co., Inc., Suite No. 1210, 29 Broadway,
New York City.

North American Merchant Marine Steamship Company, P. O.
Box 1061, Albany, N. Y.

Ocean & Inland Transportation Company, Inc., 15 Moore St.,
New York City. H. S. Davidge, traffic manager; W. K. Lewis,
Canadian Agent, 631 Coristine Bldg., Montreal, P. Q.

John J. A. O'Neill, Room 923, 1 Broadway, New York City.

Superior Transportation Co., Inc., Room 206, 15 Moore St., New
York City.

M. R. Tague Transportation Company, 29 Broadway, New York
City. P. Reynolds Tague, manager.

Waldie & McGeeney, 33 Coenties Slip, New York City.

The following interests act as forwarding agents and brokers in
securing cargoes and negotiating freight rates, etc., via New York
State canal lines:

Capt. Frederick R. Bouchard, 79 Broad St., New York City.

John J. Hughes, 44 Whitehall St., New York City.

Marine Forwarding Company, Inc., 323 Chamber of Commerce
Bldg., Buffalo, N. Y.

Seaboard Forwarding Company, Inc., 72 Pearl St., Buffalo, N. Y.

As a matter of information, there are given below the names of
industries operating cargo barges on the New York State canals,
each for the transportation of its own supplies or products.

Finch, Pruyn & Company, Inc., Glens Falls, N. Y.

Glens Falls Portland Cement Company, Glens Falls, N. Y.

Griffin Lumber Company, Hudson Falls, N. Y.

Kenyon Lumber Company, Huhson Falls, N. Y.

Ore Carry Corporation, C. S. Hawkins, manager, 2 Rector St.,
New York City.

Seneca Transportation Company, 653 Ellicott Square, Buffalo,
N. Y.

Standard Oil Company, 58 North Pearl St., Albany, N. Y.

Syracuse Sand Company, 300 West Water St., Syracuse, N. Y.

Detailed information as to rates, schedules, or other transporta-
tion matters may be obtained by direct inquiry to carriers named
herein or by communication with this department.

EDWARD S. WALSH,

Superintendent of Public Works.

Issued at Albany, N. Y., May 10, 1923.

273 [Exhibit No. 5.—Map, omitted in printing.]

274

In United States District Court

[Title omitted.]

Opinion filed

Aug. 31, 1925

The State of New York owns the waterway known as the barge canal, extending from Albany to Tonawanda, with branches to other places, connecting the Great Lakes with the Hudson River, Lake Champlain, and the Finger Lakes. The State has also constructed as an adjunct of, or convenience for, its canal some fifty-seven terminals, viz, docks or wharves, with more or less transportation facilities thereupon and upon the land adjacent to such wharves. It is commonly known that these properties or activities "are great public works for the benefit of all the people * * * [They are] functions exercised by the State solely for the public welfare. The State has made a great public highway which can be used free for transportation purposes, and while the State does not own the boats for carrying merchandise, it controls and manages the canal * * *. The object of the terminals is to allow persons using the canal to make proper connection with the railroads or boats for the further transportation of their cargoes." (Per. Kellogg, P. J., *People v. Public Service Commission*, 198 A. D., 436, at 443.)

Among these terminals thus belonging to the State of New York is one at Erie Basin in the city of Buffalo. Here the State has about seven acres of land between the canal and Rock Street, and on the other side of this street is the right of way and main line tracks of the petitioner herein, a New York corporation.

Upon its property the State has constructed what from the meagre evidence is a sort of freight yard, i. e., it has constructed tracks, switches and the like so that it would be possible to deliver goods ex railway cars from any part of the country alongside barges, and similarly to receive from barges directly into railway cars goods destined anywhere by rail.

This is physically possible because there is a track across Rock Street connecting the New York Central tracks with those of the State. This physical connection was made some years ago by agreement between the proper State authorities and the Director General of Railways.

The State of New York, however, does not wish to operate, or at any rate never has operated, this terminal yard by any force of its own employees. So far as appears it has no cars, engines or employees for that purpose. So that while it has for several years been possible physically to transfer goods from terminal to main line tracks, it has not been done because the

276

State would not operate its own terminal and the railroad was not willing to operate the terminal for it.

It is recognized that this condition is more or less like that existing at other of the barge canal terminals.

The State first applied to the Public Service Commission of New York (second department) for an order requiring the railway to furnish the rolling stock and men necessary "to render the terminal tracks of the connection available for traffic."

The commission made such an order June 24th, 1920. Thereupon the railway duly applied by certiorari for the vacation thereof, and the Supreme Court of the State held that inasmuch as the freights which the railway was required by the order in question to carry over the connection and over the tracks at said Erie Basin were interstate commerce, jurisdiction to make such an order as that complained of had passed to the Interstate Commerce Commission since the passage of the transportation act, 1920. It followed that the public service commission was without authority to make the order in question, and such order was vacated. (*People etc. v. Public Service Commission*, 198 A. B., 436). This decision was affirmed without opinion in 232 N. Y., 606, and the Supreme Court of the United States refused to interfere by denying certiorari in 258 U. S., 621.

Thereupon and on or about March 1, 1923, the State of New York by its superintendent of public works filed with the

Interstate Commerce Commission what it called a "complaint for failure to render service under section 6, subdivision 13 of the interstate commerce act." This document set up most of the facts hereinabove recited, and added in substance that the railroad's lines reached industries in and around Buffalo and interchanged traffic with railroads serving the region and under the jurisdiction of the commission. The only method of interchanging traffic between the barge canal and such industries and railways was over the New York Central tracks, but that company had refused, and continued to refuse "to interchange any traffic with the terminal." It was further asserted that "the character of the traffic attempting to move but prevented by" the railroad company was "largely interstate."

Therefore the State of New York prayed for an order, which the commission subsequently granted on December 9, 1924.

This order is in terms granted in a case in which the only petitioners or plaintiffs are the State of New York and its superintendent of public works. But it appears that two corporations (*Rochester Terminal & Canal Corporation*, and *Inter-Waterways Line, Inc.*), filed a petition declaring that they were "common carriers operating canal boats, tugs, and other equipment for the transportation of goods, wares, and merchandise upon the barge canal of the State of New York," and further that it was "essential to their business that they should be able to interchange traffic with the defendant New York Central Railroad Company, since they had no other means of reaching carriers by rail in the Buffalo

278 switching district at the Erie Basin terminal except from the lines of the defendant." Therefore these two concerns prayed leave to intervene and "to be treated as parties hereto." This prayer the commission granted. The intervenors filed no further pleading; and official or agent of each testified before the commission, apparently at the instance of the State of New York.

This was the extent of their intervention. The order passed is as follows:

"It is ordered, That the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the city of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

"It is further ordered, That said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom."

279 This petition or bill in equity was filed for the purpose of obtaining a decree forever enjoining the operation or execution of said order.

The usual motion for an interlocutory injunction was made and came on to be heard on May 2d, 1925, pursuant to an order to show cause with stay theretofore issued.

At the hearing of said motion for preliminary injunction, and in open court, it was agreed that since no other or further testimony was contemplated by any party except such as had already been adduced before the Interstate Commerce Commission, the testimony and exhibits so offered and introduced before the commission should be filed in this court and the court proceed to a final hearing in this cause.

This being agreed to, the case was heard before the Hon. Charles M. Hough, circuit judge; Hon. John C. Knox, and Hon. Frank Cooper, district judges.

Parker McCollester (Charles C. Paulding, Clyde Brown, and Robert E. Whalen on the brief), for petitioner, New York Central Railroad.

Blackburn Esterline, Assistant Attorney General, for the United States.

P. J. Farrell for Interstate Commerce Commission.

Almon W. Burrell, deputy attorney general of the State of New York, addressed court and filed brief as *amicus curiae*.

280 HOUGH, C. J.—It is always advisable, and sometimes vital, to get behind the forms and formal parties of a litigation and ascertain who is the actual person insisting on the demand in suit, what that person wants, and why it is wanted.

In form this suit has nothing to do with the State of New York, but the truth is that that State is by long odds the person or party most seriously involved, and it is the maker of the essential demand herein.

Description of that demand may be approached by another quotation from the dissenting opinion of Kellogg, J., in 198 A. D. 436. That learned judge not only said *ut supra* that the State built, controlled, and managed the canal, but that it also “controls and manages the terminals” thereof, including of course the Erie Basin terminal in Buffalo.

This was error, probably inadvertent; the State did build the terminal, it owns it, and has made of the Erie Basin terminal what may fairly be called a railroad yard. But in the sense of operating or rendering useful the railroad yard that is the important part of that terminal, it never has done, and does not intend to do the same. This case results from an effort to make someone else do what it has declined to do.

The State of New York is not a carrier, common or otherwise. If the State should enter upon common carriage, and for that purpose acquire rolling stock, etc., it might well *pro tanto* lay
281 aside its sovereignty and subject itself to the jurisdiction of mere regulatory authority, whether of its own creation, of another State, or of the Nation (*Georgia v. Chattanooga*, 264 U. S. 472).

But New York has done nothing of this kind. It did petition the Interstate Commerce Commission to grant the order now attacked, but it distinctly did not prefer that petition as a common carrier, much less as one subject to the regulatory jurisdiction of the commission itself.

Therefore one way, and an accurate way, of putting the question before us is to inquire whether at the request of a sovereign State which is not a common carrier but is beyond and superior to the regulatory or coercive power of the commission—that body can lawfully compel a carrier undoubtedly subject to its jurisdiction to operate the State's property, i. e., to take over the management of the State's Erie terminal which the State itself refuses to operate as a railroad yard.

It is here essential to state that I regard the order complained of as having been made solely on the demand and at the suit of the State of New York. The intervention (so-called) of the two private corporations above named was almost farcical. Both of them averred (in their application for intervention) that they were

common carriers of goods, &c., upon the barge canal. But no evidence was given that either of these concerns was or ever had been engaged in interstate commerce. On the contrary the president of one of them deposed that his concern was "not in the interstate carrying business," and the manager of the other stated on oath that his sole interest in this proceeding was that he sometimes did not get "eastbound business (from Buffalo) because there was
282 no service from the terminal to the industries located in the Buffalo switching district." In other words he sometimes failed to get some intrastate business. The substance of the matter is that no common carrier engaged or seeking to engage in interstate business asked the commission to do what it did.

Consequently the question again arises whether the commission could do what was done solely at the request of New York and because (to summarize what is actually shown by the record) that State having taken the trouble to make a freight yard alongside the barge canal and contiguous to the tracks of the New York Central Railroad desired that railroad to take over and operate that freight yard in order to attract business to its canal.

The evidence seems to me full that if it were made easy to transfer goods from barge to car or the reverse, business might be attracted to the barges; and particularly is it plain that if someone would undertake the business of collecting goods within the Buffalo switching district and delivering them on board barges at the terminal (or reversing the process) the procedure would meet with the approval of perhaps many manufacturers and shippers doing business in Buffalo.

It is a fair summary of what this order means that the plaintiff railroad shall extend its Buffalo yards so as to make the State's terminal an integral portion thereof. Practically the railroad is commanded to enter upon the State's property and establish a freight depot with appropriate switching and distributing service at the canal edge.

283 The entire cost of this operation is laid upon the plaintiff railroad; also (so far as shown by this record) the entire cost of upkeep of terminal, tracks, etc. The charges to be made for these services seem to be at present left to be fixed by the plaintiff railroad, subject, however, to the regulatory power of the commission.

The present State of the law on this matter seems to be this: The courts of New York have decided that the Public Service Commission of that State cannot do what the State wants, and the Supreme Court has not affirmed that ruling, but declined to disturb it; consequently we accept it. But no court has said as yet that in a proceeding such as was actually brought by the State before the Interstate Commission that body was empowered to give the State what it wanted. Therefore that question comes before this court for the first time.

This situation may be considered from several legal viewpoints.

1st. Could the commission do what it did a under the sections of the statute invoked, or b at the request of the State of New York only?

2nd. Could the commission lawfully require the railroad to extend its lines by undertaking the management and operation of another's railroad property,—especially when that other is a sovereign State and not judicially compellable to respond for its own wrongs or to maintain in operative condition the property to be managed by the railroad?

3rd. If the statute does grant the commission such powers, is such statute constitutional?

I prefer to confine present expression of opinion to the first of the above propositions.

284 The petition presented to the commission was specifically based on paragraph 13 of section 6 of the interstate commerce act as at present amended.

It is well known that this section took its present shape principally to facilitate and advantage traffic through the Panama Canal. But it is so drawn as to be of much wider import. So I cull from the statute words which seem to me fairly to express the idea which the majority of the commission thought authorized the order now complained of.

The following are the operative words of the statute:

"When property may be transported from point to point in the United States by rail and water, the transportation being by a common carrier or carriers and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction in the following particulars:

"a. To establish physical connection between the lines of the rail carrier and the dock at which interchange of property is to be made. To prescribe the terms and conditions upon which these connecting tracks shall be operated (and to) determine what sum shall be paid to or by either carrier.

"b. To establish through routes and maximum joint rates between and over such rail and water lines.

"c. To establish proportional rates or maximum and minimum proportional rates."

The foregoing states the circumstances under which the Commerce Commission may exercise power. It is to be noted that no request was made to establish rates of any kind or routes. Nor was
285 any request made to establish physical connection between the railway line and the dock; that physical condition exists and has existed for some years.

It follows that the only statutory language covering what the commission was asked to do and did do is the provision that—

"the commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may either in the construction or the opera-

tion of such tracks determine what sum shall be paid to or by either carrier."

Now let it be admitted that the words "may be" (*supra*) authorized the commission to step in upon the mere hope or possibility that a connection will make or attract business. But it seems to me quite clear that when the statute declares that when it comes to directing the operation of tracks a determination shall be made of what shall be "paid to or by either carrier"—such a statute necessarily implies and plainly means that there shall be before the commission, and both subject to its jurisdiction, two carriers. This is an impossibility when one party and the only substantial party before the commission was the State of New York.

Without pursuing the matter further, I am of opinion that plaintiff should take a decree as prayed for.

Dated, June 13, 1925.

CHAS. M. HOUGH,
U. S. Circuit Judge

I concur,

JNO. C. KNOX,
U. S. District Judge

[File endorsement omitted.]

286

In United States District Court

Dissenting opinion filed

Aug. 31, 1925

COOPER, J., dissenting.—The Interstate Commerce Commission's order of December 9, 1924, requires the petitioner railroad to provide transportation service between the Erie Basin barge canal terminal in the city of Buffalo, on the one hand, and points and shippers located on said railroad company's lines and on the lines of its connections, on the other hand, and to perform upon the tracks of said terminal the operating service necessary to an interchange of traffic with the barge-canal lines at said terminal. The order did not require the making of a physical connection between the tracks of the petitioner railroad and the tracks on the barge canal terminal, for the reason that the physical connection between the tracks of the petitioner railroad and the tracks on the barge canal terminal had been made by agreement with the State of New York, the owner of the terminal, and the Director General of Railroads while the New York Central was operated by the Government under the director general.

The statute chiefly involved here is sub-division 13 of section 6 of the interstate commerce act, which is as follows:

"(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier

or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June 18, 1910:

287 “(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier:

“Provided, That construction required by the commission under the provision of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this act.”

The power of the commission under this statute to direct the construction of a physical connection, that is, a connecting track, and the operation of such track, in an appropriate case is not seriously challenged.

The railroad company alleges that the facts shown here, however, do not make the statute operative, or, in other words, that the commission had no jurisdiction in the instant case. This is based chiefly on the contention that there were no interstate water common carriers before the commission.

288 Two water carriers intervened in the proceeding, viz: Rochester Terminal and Canal Corporation and Interways Line, Inc., by a petition which appears in the record.

The commission held that their intervening petition was regular and in accordance with its rules. The commission was authorized to make its own rules and was competent to determine that the intervention was in accordance with such rules. The court should be concluded by the commission's determination. For this court to hold otherwise would almost usurp the power of the commission to make and interpret its own rules.

The intervenors described themselves as common carriers in their intervening petition and the commission so found. The fact that they did not file a schedule of rates, or tariff of charges, with the commission is not serious. A plea of non-filing would not be available as a defense in an action against them. Assuming that the court is not bound by the determination of the commission as to the character of these water carriers, the evidence is sufficient to

show that they are common carriers transporting freight moving in interstate transit.

Even if none of the boats of the intervening water carriers themselves move interstate or transport freight which moves in interstate transit, nevertheless the rail carrier is an interstate carrier, and the statute would be satisfied by the carrying of freight which crosses the State line on the defendant railroad's cars and passes through this terminal for water transportation for points in the State of New York having water connections. It would also be satisfied with shipments originating in New York State carried by water carrier to the terminal in question and then transported over the railroad lines to other States.

289 One of the plain purposes of the Federal statute is the supplying of facilities for the exchange of interstate water and rail traffic where no such facilities now exist, or in other words for the promotion of interstate commerce by compelling interchange between rail and water carriers, one or both being engaged in interstate commerce.

Of course there can be no interstate or other commerce by rail and water carrier through this terminal if no one operates the connecting tracks on the terminal. It is clear, however, that there is potential interstate commerce at this point. The statute does not require the present existence of such interstate commerce by rail and water carrier or carriers. The statute is satisfied if there "may be" such commerce. There being potential rail and water interstate commerce through this terminal and a physical connection between the lines of the rail carrier and the tracks on the terminal dock to which the water carrier has access, it was within the power of the Interstate Commerce Commission to require the connection and the tracks on the terminal to be operated by the rail carrier.

The very ground of the decision in the State courts was that the potential traffic through this terminal was interstate, in part at least, and, therefore, the Interstate Commerce Commission and not the public service commission of the State had jurisdiction.

Peo. ex rel. N. Y. Central vs. P. S. Com. 198 App. Div., 436, 442, affirmed 232 N. Y. 606 without opinion.

The rail carrier is inconsistent in contending in this court 290 that there is no interstate commerce, even potential, which would pass through this terminal and that, therefore, the Interstate Commerce Commission had no jurisdiction to make the order in suit after prevailing in the State courts on the ground that there was interstate commerce and that, therefore, the State public service commission had no jurisdiction.

True, the terminal dock and the tracks thereon, including the connecting track, belong to the State of New York, but the State of New York is not a common carrier (Peo. ex rel. N. Y. Central vs. Pub. Ser. Comm. supra), and it has no equipment for the operations specified in the order of the Interstate Commerce Commission.

If the terminals and tracks thereon are part of the canal system of the State, then the State, if it could render such transportation service, would be required to render the service gratis, for section 9 of Act VII of the State constitution prohibits the imposing of "tolls"—on persons or property transported on the canals.

The act under which the funds for the barge canal terminals and tracks thereon were authorized, the terminals and railroad tracks constructed, and their use regulated, in substance puts these canal facilities, along with the canals of the State, under the jurisdiction of the canal board of the State.

Chap. 746, of the Laws of 1911, approved by referendum of the people of the State.

Water carriers are not usually equipped to operate railroad tracks. It follows, therefore, that if the connection here is to be operated at all, it must be by the petitioner railroad, which is equipped for such operation.

291 Even if this be viewed as an order which compelled the rail carrier to extend its tracks, to which view the writer does not subscribe, nevertheless by other sections of the same statute such power resides in the commission. This power is contained in paragraph 21 of section 1 of the act. Such of the cases cited by counsel for the railroad company on the theory that the order of the commission requires an unlawful extension of its tracks, as were decided since the act in question, are not in point and the physical situation in the cases cited are clearly distinguishable from the situation in the instant case. The prior cases, of course, can have no bearing.

The requirement that such extension could not be made unless the commission should find that it was in the interest of public convenience and necessity is met by the finding of the commission to that effect.

That the petition was originally made by the representative of the State of New York, having certain duties relating to the barge canal, is not serious. There were intervening water common carriers and the proceeding might have been instituted in the first instance by the Interstate Commerce Commission of its own initiative under section 13 of the act in question (section 8581 (2) of the Compiled Statutes).

The fact that in the order under consideration the commission has made no provision for the payment of any sum by the water carrier to the rail carrier is unimportant.

There is no construction cost to be apportioned. The operation cost will presumably be paid by the shipper. Thus there will
292 apparently be nothing to be paid by the water carrier. If in the course of the operation of the connection undue expense to the rail carrier results, the jurisdiction of the commission to apportion some part thereof upon the water carrier by means of rates, or otherwise, remains to be made effective at any time.

The lack of a provision in the order fixing the rates to be charged for the service is of no moment here. If the rates charged by the railroad shall be deemed excessive, it is within the power of the Interstate Commerce Commission to fix the rates and to apportion the expense of operating the connection between the rail and water carrier in the fixing of through rates.

The question of subjecting the railroad company to liability for damages arising from operating the tracks upon the property of the State is not a serious one in the determination of the matter now before the court. The State maintains its canals, and no assumption can fairly be made that it will not properly maintain its canal terminals. The contract for the construction and operation of the terminal tracks in question between the State and the Director General of Railroads, while the railroads were operated by the Federal Government, expressly provided that the State should maintain the tracks on this terminal. This contract is probably not now in effect.

Even if the State should not properly maintain this terminal, and the tracks should become dangerous to operate, such tracks might well be maintained by the railroad and, if not collectible from the State, the expense of such maintenance, like the expense of maintaining its own right of way, might become an important factor in the fixing of the rates to be charged for the service, and
293 may also be apportioned between the rail and water carriers.

Moreover, the jurisdiction of the Interstate Commerce Commission is continuous and it may from time to time alter or modify the terms on which the connection shall be operated. If the State should not maintain its terminal tracks, the Interstate Commerce Commission has the power to rescind its order if the service required would, because of nonmaintenance by the State, be unduly burdensome to the railroad, or to the water carriers, or to both.

No presumption may be indulged in that the railroad will not be treated fairly by the commission.

The writer is unable to agree with the majority of the court and holds that the order was within the jurisdiction of the Interstate Commerce Commission and that the injunction should be denied.

FRANK COOPER,
U. S. D. J.

[File endorsement omitted.]

294 In United States District Court

[Title omitted.]

Before the honorable Charles M. Hough, United States circuit judge, and the honorable John C. Knox and the honorable Frank Cooper, United States district judges, holding the District Court pursuant to the provisions of the urgent deficiencies act of October 22, 1913 (38 Stat. 219).

Final decree

Filed Oct. 9, 1925

This cause having come on to be heard May 2, 1925, upon the application of the petitioner for an injunction, the separate answers of the United States and the Interstate Commerce Commission, and upon the record of the proceedings before the Interstate Commerce Commission in State of New York, et al. v. New York Central Railroad Company, Docket No. 14777, said record being the only evidence introduced at the hearing; and it having been agreed at the argument that the cause should be deemed submitted for final hearing; and the cause having been argued by counsel and submitted for final hearing; thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

295 That the application for a permanent injunction be, and the same is hereby, granted as prayed in the petition, and that the order of the Interstate Commerce Commission in State of New York, et al. v. New York Central Railroad Company, Docket No. 14777, on the docket of the commission, entered December 9, 1924, and referred to in the petition, be, and the same is hereby, permanently and forever annulled and suspended; and that the respondent, its officers, members, examiners, agents, and attorneys and any or all persons whosoever be permanently and forever restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

C. M. HOUGH,
United States Circuit Judge.
JNO. C. KNOX,

United States District Judges.

Approved as to form:

BLACKBURN ESTERLINE,
For the U. S. A.

P. J. FARRELL,
For the I. C. C.

[File endorsement omitted.]

296 United States District Court

[Title omitted.]

Docket entries

1925

- Apr. 23. Filed petition for injunction.
28. " petition, served Apr. 25, 1925.
May 4. " answer of United States.
4. " intervention of Interstate Commission.
4. " proof of service of petition.
6. " answer of Interstate Commission.

- Aug. 31. " opinion of Judges Hough & Knox & dissenting
 opinion of Judge Cooper.
Oct. 9. " & entd. final decree.
Nov. 2. Issued injunction.
 9. Filed injunction, served Nov. 6, 1925.
 23. " petition of U. S. & Interstate Commission for appeal
 & assignment of errors.
Dec. 4. " order allowing appeal.
 10. " citation.
 18. " praecipe for record.
 21. " stip. & order & entd. order as to transcript.
 21. " narrative statement of testimony & exhibits.
 31. " duplicate order enlarging time to docket & file record.

297 In United States District Court

[Title omitted.]

Petition for appeal

Filed Nov. 23, 1925

United States of America and Interstate Commerce Commission, respondents, feeling themselves aggrieved by the final order or decree of the district court made and entered October 9, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

OLIVER D. BURDEN,

United States Attorney, Northern District of New York.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

[File endorsement omitted.]

298 In United States District Court

[Title omitted.]

Assignment of errors

Filed Nov. 23, 1925

United States of America and Interstate Commerce Commission, respondents, now come, by their respective counsel, and in connection

with their petition for appeal, file the following assignment of errors, on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the district court entered October 9, 1925.

The district court erred:

I. In suspending and annulling the commission's order of December 9, 1924.

II. In holding that the order was made "solely on the demand and at the suit of the State of New York."

III. In holding that, in making the order, the commission exceeded its jurisdiction because it did not have before it two carriers subject to its jurisdiction and prescribe the sum of money to be "paid to or by either carrier" in connection with the operation covered by the order.

299 IV. In deciding, holding, and adjudging as follows:

"It is always advisable, and sometimes vital, to get behind the forms and formal parties of a litigation and ascertain who is the actual person insisting on the demand in suit, what that person wants and why it is wanted.

"In form this suit has nothing to do with the State of New York, but the truth is that that State is by long odds the person or party most seriously involved, and it is the maker of the essential demand herein."

V. In deciding, holding, and adjudging as follows:

"Therefore one way, and an accurate way, of putting the question before us is to inquire whether at the request of a sovereign State which is not a common carrier but is beyond and superior to the regulatory or coercive power of the commission, that body can lawfully compel a carrier undoubtedly subject to its jurisdiction to operate the State's property, i. e., to take over the management of the State's Erie terminal which the State itself refuses to operate as a railroad yard."

VI. In deciding, holding, and adjudging as follows:

"It is here essential to state that I regard the order complained of as having been made solely on the demand and at the suit of the State of New York. The intervention (so-called) of the two private corporations above named was almost farcical. Both of them averred (in their application for intervention) that they were common carriers of goods, &c., upon the barge canal. But no evidence was given that either of these concerns was or ever had been engaged in interstate commerce. On the contrary the president of one of them deposed that his concern was 'not in the interstate carrying business', and the manager of the other stated on oath that his sole interest in this proceeding was that he sometimes did not get 'east-bound business (from Buffalo) because there was no service from the terminal to the industries located in the Buffalo switching district.' In other words he sometimes failed to get some intrastate business. The substance of the matter is that no common carrier

engaged or seeking to engage in interstate business asked the commission to do what it did."

VII. In deciding, holding, and adjudging as follows:

"Consequently the question again arises whether the commission could do what was done solely at the request of New York and because (to summarize what is actually shown by the record) that State, having taken the trouble to make a freight yard alongside the barge canal and contiguous to the tracks of the New York Central Railroad, desired that railroad to take over and operate that freight yard in order to attract business to its canal."

300 VIII. In deciding, holding, and adjudging as follows:

"It is a fair summary of what this order means that the plaintiff railroad shall extend its Buffalo yards so as to make the State's terminal an integral portion thereof. Practically the railroad is commanded to enter upon the State's property and establish a freight depot with appropriate switching and distributing service at the canal edge."

IX. In deciding, holding, and adjudging as follows:

"The present state of the law on this matter seems to be this: The courts of New York have decided that the Public Service Commission of that State can not do what the State wants, and the Supreme Court has not affirmed that ruling, but declined to disturb it; consequently we accept it. But no court has said as yet that in a proceeding such as was actually brought by the State before the Interstate Commission that body was empowered to give the State what it wanted. Therefore that question comes before this court for the first time."

X. In deciding, holding, and adjudging as follows:

"Now let it be admitted that the words 'may be' (supra) authorized the commission to step in upon the mere hope or possibility that a connection will make or attract business. But it seems to me quite clear that when the statute declares that when it comes to directing the operation of tracks a determination shall be made of what shall be 'paid to or by either carrier'—such a statute necessarily implies and plainly means that there shall be before the commission, and both subject to its jurisdiction, two carriers. This is an impossibility when one party and the only substantial party before the commission was the State of New York."

XI. In entering the following decree:

"Now, therefore, in consideration of the premises, we do hereby strictly enjoin you or restrain you, and each of you, and each of your servants, agents, and attorneys, from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute, any action or proceeding whatsoever to enforce the said order of the Interstate Commerce Commission, entered December 9, 1924, in State of New York et al. v. New York Central Railroad Company, Docket No. 14777, on docket of the commission, and from taking, instituting,

or prosecuting, or attempting to take, institute, or prosecute, any action or proceeding whatsoever under or based upon said order, or based upon any disobedience thereof, and from in any way enforcing, or attempting to enforce or carry out the said order, or any of the terms thereof, unless or until further order of this Court in the premises."

301 Wherefore, respondents, and each of them, pray that the final order or decree of the district court entered October 9, 1925, be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the bill in equity dismissed; and for such other and further order as may be appropriate.

OLIVER D. BURDEN,

United States Attorney, Northern District of New York.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

[File endorsement omitted.]

302

In United States District Court

[Title omitted.]

Order allowing appeal

Filed Dec. 4, 1925

In the above-entitled cause, United States of America, and Interstate Commerce Commission, respondents, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the district court, made and entered October 9, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

C. M. HOUGH,

United States Circuit Judge.

JNO. C. KNOX,

FRANK COOPER,

United States District Judges.

Dated Dec. 4, 1925.

[File endorsement omitted.]

303

In United States District Court.

[Title omitted.]

Praeceptum for transcript of record

Filed Dec. 18, 1925

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of appeal of the United States and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Petition for injunction.
2. Answer of the United States and intervention and answer of Interstate Commerce Commission.
3. Agreed narrative of the transcript of the record before the Interstate Commerce Commission in a proceeding entitled, State of New York, et al., v. New York Central Railroad Company, No. 14777.
4. Opinion of the court and dissenting opinion.
5. Final decree.
6. All journal entries in their appropriate order.
7. Petition for appeal; assignment of errors; order allowing appeal; praecipe for record.
- 304 8. Notice of appeal to attorney general of New York.
9. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

Service of a copy of the within praecipe for record is hereby admitted and acknowledged this 15th day of December, 1925.

PARKER MCCOLLESTER,
Solicitor for Appellees.

[File endorsement omitted.]

305 [Citation in usual form showing service on Parker McColester, filed Dec. 10, 1925, omitted in printing.]

306 [Clerk's certificate to foregoing transcript omitted in printing.]

307 In the Supreme Court of the United States.

[Title omitted.]

Statement of points to be relied upon and designation of parts of record to be printed

Filed Feb. 6, 1926

By their respective counsel the parties stipulate that the entire record now on file shall be printed for the hearing and determina-

tion of the foregoing appeal except so much and such parts thereof as are designated below which shall not be printed or otherwise reproduced by the clerk, viz:

(a) Exhibit No. 1 (blue print), map which indicates by symbols the locations of the various terminals throughout the waterways system.

(b) Exhibit No. 5 (blue print), map, colored and marked as to distances, etc., of a portion of Erie Canal lands belonging to the State of New York, made pursuant to Ch. 199, laws of 1910.

(c) Exhibits Nos. 6, 7, 8, 9, 10, 11, 12, and 13, which consist of original photographs in the narrative of the testimony.

(d) The copy of the report and order of the Interstate Commerce Commission as the same appears in the narrative of the testimony (a duplicate of Exhibit C to the petition which has been designated for printing).

For the use of the court and counsel on the hearing of the appeal, either side may produce or furnish to the court copies or duplicates of the foregoing exhibits or any of them so omitted from the printing.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

PARKER MCCOLLESTER,

Solicitor for Appellee.

[File endorsement omitted.]

308 *Statement of points on behalf of the United States*

United States of America will rely on the following points in brief and in oral argument on the hearing of the appeal for the reversal of the decree of the District Court.

I. The order of the commission was within the jurisdiction of the commission as it was authorized by the interstate commerce act and is based on substantial evidence.

II. The opinion and decree of the District Court constitute a constricted and erroneous view of the facts of the particular case and are contrary to the express intent and purpose of the Panama Canal act (Ch. 309, 37 Stat. 560), and other provisions of the interstate commerce act, including section 500 of the transportation act of 1920 (Ch. 91, 41 Stat. 499), which provides, "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

III. The action of the District Court in reviewing and weighing the evidence taken before the Interstate Commerce Commission and

then substituting the findings, opinion and decree of the court for the findings and order of the commission was erroneous.

309 IV. The holding that the order of the Interstate Commerce Commission was made "solely on the demand and at the suit of the State of New York" was unwarranted by the facts and contrary to law.

V. The holding that, in making its order, the commission exceeded its jurisdiction because it did not have before it two carriers subject to its jurisdiction and determine the sum of money to be "paid to or by either carrier" in connection with the operation covered by the order, was unwarranted by the facts and contrary to law.

VI. The course of the District Court in disregarding and ignoring the forms and formal parties of the litigation and treating the case as not one which involved the public interest but as strictly a case which concerned the State of New York alone as the maker of the essential demand was reversible error.

VII. The holding that the question before the District Court was to inquire whether at the request of the State of New York "which is not a common carrier but is beyond and superior to the regulatory or coercive power of the commission, that body can lawfully compel a carrier undoubtedly subject to its jurisdiction to operate the State's property, i. e., to take over the management of the State's Erie terminal which the State itself refuses to operate as a railroad yard," was unwarranted by the facts and contrary to law.

VIII. The holding that "the intervention of the two private corporations (Rochester Terminal & Canal Corporation, and Interwaterways Line, Inc.), was almost farcical" and that "the substance of the matter is that no common carrier engaged or seeking to engage in interstate business asked the commission to do what it did" was an assumption unwarranted by the facts and contrary to law.

IX. The holding "it is a fair summary of what this order means that the plaintiff railroad shall extend its Buffalo yards so as to make the State's terminal an integral portion thereof. Practically the railroad is commanded to enter upon the State's property and establish a freight depot with appropriate switching and distributing service at the canal edge" was an assumption unwarranted by the facts and contrary to law.

310 X. The holding that the statute necessarily implies and plainly means that there shall be before the commission, and both subject to its jurisdiction, two carriers, and that this is an impossibility when one party and the only substantial party before the commission was the State of New York, was unwarranted by the facts and contrary to law.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

Service of the foregoing statement of points and the receipt of a copy thereof are hereby acknowledged this 1st day of February, 1926.

PARKER MCCOLLESTER,
Solicitor for Appellee.

[File endorsement omitted.]

[Indorsement on cover:] File No. 31,653. N. New York D. C. U. S. Term No. 284. The United States of America and the Interstate Commerce Commission, appellants, v. the New York Central Railroad Company. Filed January 29th, 1926. File No. 31,653.



CONTENTS

	Page
OPINION	1
JURISDICTION	1
QUESTION	2
STATEMENT	3
ARGUMENT	11
SUMMARY	11
I. The State of New York owns and maintains the terminal. The State never claimed that the State "is beyond and superior to the regulatory or coercive power of the commission" whose jurisdiction it invoked in the utmost good faith without reservation of any kind, either then or thereafter.....	13
II. In order to invoke the jurisdiction of the commission it was not necessary that the State of New York should be a common carrier. Its ownership and maintenance of the terminal qualified it as a proper party under the statute to file the complaint.....	23
III. Erie Basin Terminal is a facility of interstate transportation.....	33
IV. The opinion of the district court not only erroneously made over and constricted the findings of the commission, but its added failure to recognize the State of New York as a party with any right or standing before either the commission or the court was likewise erroneous....	37
V. The order of the commission is not invalid because it embraces "all traffic, interstate and intrastate," that may be transported to or from the terminal over the New York Central lines.....	43
VI. Conclusion.....	45
APPENDIX A. The statute.....	46
APPENDIX B. Excerpts from the interstate commerce act in re water lines or transportation by water lines.....	51

II

CASES CITED

	Page
<i>Boise Lumber Co. v. Pacific & Idaho Northern</i> , 33 I. C. C. 109.....	14
<i>City of New York v. United States</i> , 272 Fed. Rep. 768.....	12, 15
<i>Dayton-Goose Creek Railway v. United States</i> , 263 U. S. 456.....	13, 44
<i>Ex parte</i> 74, 58 I. C. C. 220.....	15
<i>Georgia v. Chattanooga</i> , 264 U. S. 472.....	11, 14, 16
<i>Minnesota Rate Cases</i> , 230 U. S. 352.....	12, 44
<i>Michie on Carriers</i> , Vol. 1, page 3, sec. 1.....	12
<i>New York Central Railroad v. United States</i> , 13 Fed. Rep. (2d) 200.....	1
<i>Public Service Commission v. New York Central</i> , 258 U. S. 621.....	33
<i>People ex rel. New York Central v. Public Service Commission</i> , 198 App. Div. 436, 441.....	11, 12, 20
<i>Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.</i> , 257 U. S. 563.....	12, 44
<i>State of New York v. New York Central Railroad</i> , 95 I. C. C. 119.....	1
<i>State of New York v. United States</i> , 257 U. S. 591.....	11, 14, 44
<i>State of New York v. United States</i> , 272 Fed. Rep. 758.....	11, 14
<i>State of Tennessee v. United States</i> , 284 Fed. Rep. 371.....	12, 15
<i>State of North Dakota v. Chicago & North Western</i> , 257 U. S. 485.....	12, 15, 19
<i>The Shreveport Case</i> , 234 U. S. 342.....	12, 44
<i>United States v. Village of Hubbard</i> , 266 U. S. 474.....	13, 44
<i>United States v. State of Tennessee</i> , 262 U. S. 318.....	12, 13, 14, 44
<i>United States v. Brooklyn Eastern District Terminal</i> , 249 U. S. 296, 305.....	12, 34
<i>United States Bank v. Planters Bank</i> , 9 Wheat. 904, 907.....	11, 17
<i>United States v. Pacific & Arctic Railway</i> , 228 U. S. 87, 102, 104.....	24
<i>Union Lime Co. v. Chicago & Northwestern</i> , 233 U. S. 211, 221.....	35
<i>United States v. Baltimore & Ohio</i> , 80 I. C. C. 143.....	14
<i>United States v. Sumpter Valley Railway Co.</i> , 53 I. C. C. 607.....	14
<i>United States v. Union Pacific Railroad Co.</i> , 28 I. C. C. 518, 520.....	14
<i>United States v. Alabama & Vicksburg Railway</i> , 40 I. C. C. 405.....	14
<i>United States v. Denver & Rio Grande</i> , 18 I. C. C. 7.....	14
<i>United States v. Adams Express Co.</i> , 16 I. C. C. 394.....	14
<i>United States v. B. & O. R. R. Co.</i> , 15 I. C. C. 470.....	14
<i>United States v. N. Y. P. & N. R. R. Co.</i> , 15 I. C. C. 233.....	15

STATUTES CITED

Act of June 29, 1906 (Ch. 3591, 34 Stat. 586).....	55, 59
Act of August 9, 1915 (Ch. 301, 39 Stat. 442).....	58
Act of August 10, 1917 (Ch. 51, 40 Stat. 272).....	52
Commerce Court act (Ch. 309, 36 Stat. 539).....	1
Panama Canal act:	
Section 11, amending section 6 of the interstate commerce act (Ch. 390, 37 Stat. 566, 568).....	2, 46, 54, 55

III

Transportation act of 1920:

	Page.
Sections 412 and 413, amending section 6 of the interstate commerce act (Ch. 91, 41 Stat. 483)	2, 46, 56
Section 500 (Ch. 91, 41 Stat. 499)	37, 49
Section 400 (Ch. 91, 41 Stat. 474)	51
Section 406 (Ch. 91, 41 Stat. 480)	53
Section 418 (Ch. 91, 41 Stat. 485)	57
Section 422 (Ch. 91, 41 Stat. 488)	58
Section 437 (Ch. 91, 41 Stat. 494)	58
Section 441 (Ch. 91, 41 Stat. 497)	59, 60
Urgent deficiencies act (Ch. 32, 38 Stat. 219, 220)	2



In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 284

THE UNITED STATES OF AMERICA AND INTERSTATE
Commerce Commission, appellants

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION

The opinion of the District Court (Circuit Judge Hough and District Judge Knox concurring, District Judge Cooper dissenting) on August 31, 1925, is reported as *New York Central Railroad v. United States*, 13 Fed. Rep. (2d) 200.

The report of the Commission is reported as *State of New York v. New York Central Railroad*, 95 I. C. C. 119.

JURISDICTION

The suit was commenced and the appeal was taken under Commerce Court Act (ch. 309, 36 Stat.

539), and Urgent Deficiencies Act (ch. 32, 38 Stat. 219, 220). The latter provides:

A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree. * * *

QUESTION

The question is whether under paragraph (13) of section 6 of the Interstate Commerce Act, which was amended by the Panama Canal Act of August 24, 1912 (ch. 390, 37 Stat. 566, 568), and sections 412 and 413, Transportation Act of 1920 (ch. 91, 41 Stat. 483), the order of the Commission (R. 7) is valid which directed the New York Central to provide and maintain a transportation service between the Erie Basin Barge Canal Public Terminal, in Buffalo, and points and shippers located on the line of the railroad and on the lines of its connections, and perform upon the standard-gauge railroad tracks within the Terminal and connected with the railroad's tracks the operating service necessary to an interchange of traffic with barge-canal lines at the Terminal—the service to embrace both interstate and intrastate traffic that may be transported to or from the Terminal over the railroad; that the service shall include the furnishing by the railroad of all cars necessary for the transportation of the traffic between the Terminal and

the points and shippers, and the operation by the railroad with its own motive power and servants upon railroad tracks within the Terminal, of all railroad cars, loaded and empty, going to or coming from the Terminal, including the spotting, placing, and removal of the cars therein and therefrom.

STATEMENT

The State of New York has constructed and equipped the Barge Canal at a cost claimed to approximate nearly \$175,000,000 (R. 20, 29), which it now maintains for the public use. The Canal has a channel with a depth of 12 feet and a minimum cross-section area of 1,125 square feet and extends from its Terminal in Buffalo down the Niagara River to Tonawanda, thence eastwardly to Waterford, where it connects with the Hudson River. Branches extend north from Waterford to Lake Champlain, north from the vicinity of Syracuse to Lake Ontario and south to Cayuga and Seneca Lakes. (R. 24.) Terminal docks, piers, warehouses, and railroad tracks have been constructed at various points along the Canal and equipment for transferring or handling freight has been installed. (R. 24.) The State furnishes the Canal and its facilities to common carriers by water without charge. (R. 24.) The capacity of the Canal is from 15,000,000 to 20,000,000 tons from May 1 to December 1. (R. 24.) The locks will take barges of 4,000 tons displacement and for the past two seasons 600 barges with an average displace-

ment of 2,500 tons have operated between Buffalo and New York.¹

Erie Basin Terminal is situated upon the harbor adjacent to Lake Erie and within the city of Buffalo. The basin has a depth of 20 feet and the Terminal has an area of 9.25 acres. The expenditure for the site, construction, and equipment of the Terminal amounts to \$2,300,000, which includes \$60,000 for railroad tracks. (R. 25.) There are two covered piers or docks. Pier No. 1 is 500 feet long and 150 feet wide and has a steel and brick warehouse with a floor area of 35,000 square feet. Pier No. 2 is 400 feet long, 150 feet wide, and has

¹ *Inland Marine Corporation.*—Operates 11 cargo-carrying steamers of 185 tons capacity, and 75 cargo barges of 300 to 600 tons capacity. Service embraces bulk-cargo movement between Buffalo and points within lighterage limits of New York harbor, and a carload and less-carload service from New York to Buffalo, with interchange at Buffalo with the lake lines from Chicago, Cleveland, Detroit, Duluth, Milwaukee, Minneapolis, St. Paul, and points in Minnesota, North and South Dakota, Montana, Western Canada, and the Northwest Pacific States, on joint canal-and-lake and canal-lake-and-rail rates.

Interwaterways Line, Inc.—Operates 5 steel motor ships, of 1,500 tons capacity each, in a bulk-cargo service between New York and Buffalo.

Murray Transportation Company.—Operates 12 300-ton and 29 500-ton barges, 12 600-ton deck-loading barges, and 3 tugs, for bulk cargoes between points in New York harbor and ports on or reached via the New York State canals.

New York Canal & Great Lakes Corporation.—Renders service on bulk cargoes between New York and canal ports, and a non-break-bulk service to Lake Erie ports. Oper-

a frame warehouse with a floor area of 6,400 square feet.

The machinery for loading and unloading includes two electrically operated semiportal jib cranes with a capacity of 3 tons each, package conveyors, traction cranes, and miscellaneous hand-operated and power-operated devices. The Terminal has over 5,000 feet of standard-gauge railroad tracks with turnouts and a storage yard with capacity of 30 cars. These tracks extend from both sides of Pier No. 1 and from the north side of Pier No. 2 to the westerly bounds of New York Central's

ates 51 750-ton steel cargo barges, 3 750-ton wooden barges, and 15 450-ton cargo-carrying powerboats.

Rochester Terminal & Canal Corporation.—Operates 10 450-ton wooden barges, with three power units. Shipments contracted for movement to and from all New York State canal and Long Island Sound ports. Merchandise shipments between New York and Rochester handled upon prior arrangement.

Transmarine Corporation, Canal Division.—Operates 30 400-ton steel barges, with 5 towing tugs. Service rendered comprises bulk-cargo movement between Buffalo and New York harbor points, and merchandise service westbound from New York harbor points to Buffalo and west thereof, reached by lake connections on joint canal-and-lake and canal-lake-and-rail rates. Principal ports are Buffalo, Cleveland, Detroit, Chicago, Milwaukee, Duluth, Superior, Minneapolis, and St. Paul.

In addition, about 20 carriers are operating in intermittent service between canal ports. The interveners are among the canal carriers which do not file tariffs with us or with the State commission. Information as to rates and other transportation matters is available to shippers through the office of the Superintendent of Public Works. (R. 24, 25.)

right of way parallelling the water front, the curvature near the point of connection ranging from 10° to 21° . (R. 25.)

New York Central has installed a switch with turnout from its westerly track forming a connection with the Terminal tracks. This westerly track is a siding having a dead end about 400 feet north of the switch point of turnout. Because of the construction and weight of the U-type switch engine New York Central has discontinued the construction of industrial sidings with a greater curvature than 12° to 15° . (R. 25.)

The curvature in reaching the Terminal tracks (R. 25) compares favorably with that of other tracks leading to waterfront properties in the vicinity, operations over which do not appear to have been abandoned by New York Central.

The latter's tracks adjacent to the Terminal are used by three other trunk line companies and each day about 100 passenger trains pass over them. These tracks are also used in switching service between New York Central's facilities and interchange points with its connecting lines. New York Central has on occasion spotted cars on the switch connection and removed cars therefrom and expresses its willingness to do so in the future. New York Central refuses to operate over the State's tracks.²

² Witness McKeown, harbor master of Barge canal at Troy, testified:

"The New York Central switched cars into our terminal. The Boston & Maine also shipped or spotted cars on our

During 1922 Barge Canal carriers interchanged about 1,106,000 tons of freight at Buffalo with Lake carriers. One-half consisted of ex-lake grain. (R. 26.) The Barge Canal carriers also brought about 38,000 tons of local traffic into Buffalo and took outbound about the same. Approximately 75 per cent of the traffic on the Barge Canal is interstate. Traffic officials of five of the principal industries at Buffalo testified in favor of the order. If the proposed service were established, the traffic manager of the Buffalo Chamber of Commerce estimated the volume of traffic that would move over the connection would range from 100,000 to 125,000 tons annually. The representative of one of the principal shippers estimated that its traffic alone would amount to 20,000 tons annually. (R. 26.)

The effect of the refusal of the New York Central to perform the transportation service is to preclude any interchange of traffic at the Terminal between the rail and Barge Canal carriers. (R. 26.)

New York Central's main line between Buffalo and New York practically parallels the Barge Canal and serves all important points reached by it. The order of the Commission was strenuously opposed

terminal. The number of tons actually spotted at the terminal amounted to between 10 and 11 hundred tons." (R. 87.)

Witness Wadsworth, Troy, who testified for New York Central, also said:

"During the last season of navigation the New York Central did take cars to or from the State terminal at Troy." (R. 118, 119.)

because (a) its effect would be to divert to the Barge Canal much traffic which now moves over the New York Central, including traffic to and from industries located on its rails, and to compel it to accept, in lieu of remunerative line hauls, switching movements at relatively small charges (R. 26); (b) numbers of industries in Buffalo are not located on rail lines and must dray or truck their traffic in any event, and industries on New York Central, if desiring to utilize the Canal, should also dray or truck their traffic thereto or therefrom or avail themselves of their water connections where existent; (c) while a curvature of 21° apparently would be encountered on but one of the tracks entering the Erie Basin Terminal, the requested service would seriously interfere with the already congested main-line operations (R. 26).

The State of New York and Edward S. Walsh, Superintendent of Public Works, alleged in the complaint "a physical connection between the standard-guage tracks laid by the State within the Terminal premises, running down to and around the piers, has been made with the railroad tracks of the defendant wholly outside the Terminal" (R. 17); the New York Central reaches industries in and around Buffalo and actually interchanges traffic with all railroads serving that region and the only method of interchanging traffic between the Terminal and the Barge Canal with the railroads and industries is over the tracks of

the New York Central by means of the physical connection between its tracks and the tracks within the Terminal (R. 18); the tracks within the Terminal and the physical connection are suitable, safe, and proper for the purpose; notwithstanding repeated demands, New York Central had refused to interchange any traffic whatever (R. 18); the traffic is largely interstate with considerable important intrastate traffic not moving. (R. 18).

New York Central in its answer admitted there is a physical connection between its tracks and the tracks within the Terminal, which is the only method of railroad interchange now available between the Terminal and industries, terminal tracks, and stations located on New York Central lines at Buffalo. New York Central by way of separate defenses set up that the State of New York is not a common carrier by rail or water, had no status under the Interstate Commerce Act to maintain the proceeding, the Commission had no jurisdiction to entertain the complaint, that no carrier by water was a party to the proceeding, and the jurisdiction conferred upon the Commission by subdivision 13 of section 6 is conditioned upon the presence of each and every of the carriers by water required to participate in the payment of the expense of operating water and rail terminals. (R. 76.)

Rochester Terminal & Canal Corporation and Interwaterways Line, Inc., intervened (R. 78) in

the complaint and alleged they were common carriers operating canal boats, tugs, and other equipment for the transportation of goods, wares, and merchandise on the Barge Canal into and out of the Erie Base Terminal, and that they should be able to interchange traffic with New York Central is essential to their business since they have no other means of reaching carriers by rail in the Buffalo switching district at Erie Basin Terminal except from the lines of New York Central.

On the hearing before the Commission both sides offered oral testimony and exhibits, including the record of the evidence and proceedings before the Public Service Commission of the State of New York—Second District—Case No. 7060, In the Matter of the Complaint of Edward S. Walsh as Superintendent of Public Works of the State of New York against United States Railroad Administration—New York Central Railroad—as to operation of railroad tracks at Erie Basin Terminal, Buffalo. (R. 79.) The Public Service Commission had ordered the New York Central to furnish the transportation service. The Appellate Division of the Supreme Court of the State of New York held that while the Terminal was entitled to the service as a matter of right, the Interstate Commerce Commission and not the Public Service Commission had the authority to act and accordingly vacated the order. (198 A. D. Rep. 436.) The judgment of the Appellate Division was affirmed by the Court of Appeals without opinion, 232 N. Y. 606, and this

Court denied petition for writ of certiorari, 258 U. S. 621. (R. 23.)

The petition avers that the order of the Commission is void on approximately sixteen grounds, paragraphs 10 to 25, inclusive. They may all be grouped under the general proposition that the order was not authorized by paragraph (13) of section 6 of the Interstate Commerce Act as amended, *supra*. The District Court took that view (R. 127) and permanently annulled and enjoined the order. From the final decree (R. 138) this appeal was taken (Tr. 142).

ARGUMENT

SUMMARY

I. The State of New York owns and maintains the Terminal. The State never claimed that the State "is beyond and superior to the regulatory or coercive power of the Commission" whose jurisdiction it invoked in the utmost good faith without reservation of any kind either then or thereafter. (*Georgia v. Chattanooga*, 264 U. S. 472; *United States Bank v. Planters' Bank*, 9 Wheat. 904, 907; *People, ex rel, New York Central v. Public Service Commission*, 198 App. Div. 436, 441; 232 N. Y. 606; 258 U. S. 621.) United States and States have frequently appeared as complainants and asserted claims before the Interstate Commerce Commission and the courts and their right to do so has never been questioned. (*State of New York v. United States*, 257 U. S. 591; *Same v. Same*,

272 Fed. Rep. 760; *United States v. State of Tennessee*, 262 U. S. 318; *State of Tennessee v. United States*, 284 Fed. Rep. 371; *City of New York v. United States*, 272 Fed. Rep. 768; *State of North Dakota v. Chicago & Northwestern*, 257 U. S. 485.)

II. In order to invoke the jurisdiction of the Commission it was not necessary that the State of New York should be a common carrier. Its ownership and maintenance of the Terminal qualified it as a proper party under the statute to file the complaint.

III. Erie Basin Terminal is a facility of interstate transportation. (*People, ex rel, New York Central v. Public Service Commission*, 198 App. Div. 436; *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 305; *Michie on Carriers*, Vol. 1, page 3, Sec. 1.)

IV. The opinion of the District Court not only erroneously made over and constricted the findings of the Commission but its added failure to recognize the State of New York as a party with any right or standing before either the Commission or the Court was likewise erroneous.

V. The order of the Commission is not invalid because it embraces "all traffic, interstate and intrastate," that may be transported to or from the Terminal over the New York Central Lines. (*Minnesota Rate Cases*, 230 U. S. 352; *The Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*,

257 U. S. 563; *State of New York v. United States*,
 257 U. S. 591; *United States v. Village of Hubbard*,
 266 U. S. 474; *United States v. State of Tennessee*,
 262 U. S. 318; *Dayton-Goose Creek Railway v.*
United States, 263 U. S. 456.)

I

THE STATE OF NEW YORK OWNS AND MAINTAINS THE
 TERMINAL. THE STATE NEVER CLAIMED THAT THE
 STATE "IS BEYOND AND SUPERIOR TO THE REGULA-
 TORY OR COERCIVE POWER OF THE COMMISSION"
 WHOSE JURISDICTION IT INVOKED IN THE UTMOST
 GOOD FAITH WITHOUT RESERVATION OF ANY KIND,
 EITHER THEN OR THEREAFTER

Because of its ownership by the State of New York the District Court declined to recognize the Terminal as a transportation facility subject to any regulation whatever, and appears to have held that the State of New York, in its ownership and maintenance of the Terminal, could not under any circumstances bring the operations thereof within the terms and provisions of the statute unless and until it "should enter upon common carriage, and for that purpose acquire rolling stock," etc. Under the "rolling stock" test announced by the District Court, if the New York Central Railroad owned it the Terminal presumably would be subject to such regulation. In short, the *ownership* of this Terminal and not the service that is or may be rendered thereby and thereover appears to have been made the basis of its noninclusion in the statute by the District Court.

In *Georgia v. Chattanooga*, 264 U. S. 472 (cited by counsel for the Government in the District Court), this Court rejected the argument that the State-owned railroad was not subject to the local ordinance of Chattanooga. On the authority of that case, the District Court in the instant case in substance held that if the State of New York should enter upon common carriage and for that purpose acquire rolling stock, etc., it "might well *pro tanto* lay aside its sovereignty and subject itself to the jurisdiction of mere regulatory authority, whether of its own creation, of another State, or of the Nation" (R. 130); that while it maintains its sovereignty and does not descend to the status of a common carrier with *rolling stock*, etc., it may not invoke the jurisdiction of the Commission.

The United States without placing itself "beyond and superior to the regulatory or coercive power of the Commission" has repeatedly invoked the jurisdiction of the Commission on complaints concerning Government traffic and its right to do so has never been questioned. (*United States v. Baltimore & Ohio*, 80 I. C. C. 143; *United States v. Sumpter Valley Railway Co.*, 53 I. C. C. 607; *Boise Lumber Co. v. Pacific & Idaho Northern*, 33 I. C. C. 109; *United States v. Union Pacific Railroad*, 28 I. C. C. 518, 520; *United States v. Alabama & Vicksburg Railway*, 40 I. C. C. 405; *United States v. Denver & Rio Grande*, 18 I. C. C. 7; *United States v. Adams Express Co.*, 16 I. C. C. 394; *United States v. B. & O. R. R. Co.*, 15 I. C. C.

470; *United States v. N. Y. P. & N. R. R. Co.*, 15 I. C. C. 233.)

The States without placing themselves "beyond and superior to the regulatory or coercive power of the Commission" likewise have repeatedly invoked the jurisdiction of the Commission and their right to do so has never been questioned. See *Ex parte* 74, 58 I. C. C. 220, and subsequent proceedings before the Commission in which States assailed the increased intrastate rates. (New York, 59 I. C. C. 290; 64 I. C. C. 55; Wisconsin, 59 I. C. C. 391; North Dakota, 61 I. C. C. 504; Illinois, 59 I. C. C. 350; 60 I. C. C. 92; Minnesota, 59 I. C. C. 502; Texas, 60 I. C. C. 421, 62 I. C. C. 591; North Carolina, 60 I. C. C. 362; Nevada, 60 I. C. C. 623; Michigan, 60 I. C. C. 245.)

States as proper parties and without placing themselves "beyond and superior to the regulatory or coercive power of the Commission" have likewise maintained suits in the courts. (*State of New York v. United States*, 257 U. S. 591; *Same v. Same*, 272 Fed. Rep. 760; *United States v. State of Tennessee*, 262 U. S. 318; *State of Tennessee v. United States*, 284 Fed. Rep. 371; *City of New York v. United States*, 272 Fed. Rep. 768; *State of North Dakota v. Chicago & Northwestern*, 257 U. S. 485.)

Erie Basin Terminal as owned and maintained by the State of New York is a facility of transportation; nothing else. And if interstate traffic *does or may* move over or through the Terminal

it becomes, regardless by whom or how it is operated, as completely subject to the power of Congress to regulate commerce and regulation by the Commission as the New York Central Lines.

In *Georgia v. Chattanooga, supra*, Georgia undertook to construct a railroad between Atlanta and Chattanooga and for its yards purchased about eleven acres in the outskirts of the latter city. The legislature of Tennessee granted to Georgia the right to secure the necessary right of way from the State line to Chattanooga. Georgia at one time had operated the railroad but since 1870 it has been operated by lessees. Chattanooga undertook to condemn for street purposes a strip through the railroad yard. Georgia challenged her right to do so on the ground that the land thus acquired by a sister State was not subject to condemnation. In dismissing the original bill for want of equity, this Court said (264 U. S. 480, 481):

Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign

privilege or immunity. (*Bank of United States v. Planters' Bank*, 9 Wheat. 904, 907; *Bank of Kentucky v. Wister*, 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co. v. Letson*, 2 How. 497, 550; *South Carolina v. United States*, 199 U. S. 437, 463.) Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.

In *United States Bank v. Planters Bank*, cited *supra*, this Court said:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. (9 Wheat. 907.)

From *United States Bank v. Planters Bank* (1824) to *Georgia v. Chattanooga* (1924) the principle has spanned more than one hundred years.

When, therefore, the State of New York invoked the jurisdiction of the Interstate Commerce Commission, she did not set her sovereignty over and above the power of Congress to regulate interstate commerce; nor was it "an accurate way of putting the question" to inquire "whether at the request of a sovereign State which is not a common carrier but

is beyond and superior to the regulatory or coercive power of the Commission—that body can lawfully compel a carrier undoubtedly subject to its jurisdiction to operate the State's property," etc.

When she invoked the jurisdiction of the Interstate Commerce Commission the State could not at the same time consistently set up her sovereignty in defiance of the power of Congress to regulate commerce, just as when Georgia went into Tennessee she could not defy Tennessee's laws. Nor has the State of New York ever attempted to do so. There has never been the shadow of a doubt what her claim was in any tribunal before which she appeared to assert it and there is certainly none here. The record does not contain the slightest evidence or suggestion that the State of New York invoked the jurisdiction of the Interstate Commerce Commission or conducted the hearing before that body with a mask on only to have it torn off by the District Court.

The authority and right of the State as any other party peacefully to submit her controversies to the jurisdiction of the duly-constituted tribunals of government, judicial or other, should be encouraged and sustained on all sides and at all times and by the courts above all others. The use of such expressions as "It is always advisable, and sometimes vital, to get behind the forms and formal parties of a litigation and ascertain who is the actual person insisting on the demand in suit, what

that person wants, and why it is wanted" (R. 130), and "In form this suit has nothing to do with the State of New York, but the truth is that the State is by long odds the person or party most seriously involved and it is the maker of the essential demand herein" (R. 130), in order to turn her away as a party without standing and not entitled to be heard or to cast doubt on the good faith of the State and those who represent her should be rejected.

Contrariwise was the action of this Court in *North Dakota v. Chicago & Northwestern Railroad*, 257 U. S. 485, 490. In dismissing the original bill filed by the State of North Dakota to set aside an order of the Interstate Commerce Commission, and sending the State to the District Court as a party in interest to bring her suit under the Constitution and laws of the United States as any other litigant, this Court said:

The main contention of the State is that if in the opinion of the Court it has a substantial right that is infringed by what the defendants are doing, Congress neither can take that right away nor prevent the State from proceeding in this Court for such remedy as law or equity may afford. But if these premises were granted, it would not follow that the bill should be maintained. It is a proceeding in equity in which the requirements of complete justice and of public policy must be taken into account. When they are considered it seems to us pretty clear that the State should be remitted to

the remedy offered by the statutes—a suit in the District Court in which the United States is made a party. Complete justice requires that the railroads should not be subjected to the risk of two irreconcilable commands—that of the Interstate Commerce Commission enforced by a decree on the one side and that of this Court on the other.

When the State of New York filed the petition before the Interstate Commerce Commission her own courts had held in this very case that Congress had taken possession of the entire field of regulation into which the State may not enter.

In *People, ex rel New York Central, v. Public Service Commission*, 198 App. Div. 436, 441 (affirmed Ct. App. N. Y., without opinion, 232 N. Y. 606; certiorari denied by this Court, 258 U. S. 621), the Appellate Division, speaking through Mr. Justice Van Kirk, said:

This act of Congress not only gives to the Interstate Commerce Commission power to establish physical connection between the lines of the rail carrier and the dock, but also to direct the rail carrier and the water carrier singly or jointly "to construct and connect with the lines of the rail carrier a track or tracks to the dock"; also full authority to determine and prescribe the terms and conditions upon which these tracks shall be operated and by whom, and what sum shall be paid to or by either carrier; also to fix rates. This act of Congress was intended to and

does cover the same field covered by the aforesaid State statute; and under it the question whether the railroad company could be compelled to operate beyond the connection itself, decided in *People ex rel. Erie R. Co. v. Pub. Serv. Comm.* (176 App. 28; 220 N. Y. 674), can not fairly arise. The freights the relator is required to carry over this connection and over the tracks in the basin are interstate commerce. (*Louisville, etc. R. R. Co. v. Stock Yards Co., supra*, 142, 143.) It is true that the only shippers named in the order are those within the State of New York. By naming these shippers no limitation of the use of the terminal to intrastate commerce was accomplished. (*McFadden v. Alabama Great Southern R. Co.*, 241 Fed. Rep. 562.) The relator company will be required to receive freight brought to the terminal by the water carrier, wherever its origin, and it will be required to transport from the shipper to the dock freight wherever its destination; and in general to interchange such traffic as is presented for interchange at the terminal. The record shows that freights upon the canal include shipments from foreign countries, as well as from other States of the Union. "Commerce takes its character as interstate or foreign when it is actually started in the course of transportation to another State or to a foreign country." (*Louisiana Railroad Commission v. Texas & Pacific Railway*, 229 U. S. 336.) "A train moving and carrying freight between two points in the same State, but which is hauling freight between points one of which is within and the other without

the State, or hauling it through the State between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto." (*Northern Pacific Railway v. Washington*, 222 U. S. 370, head note.) Congress having exerted its authority to regulate interstate commerce by the direction and control of connections between rail carriers and water carriers, the entire subject of such connections is removed from the operation of the authority of the State, and the power of the State to regulate such connections and the operation of them, ceases to exist; when the Federal government has exercised its power, it covers the whole field; and even if, in certain details, the State act differs from the Federal act, such State act is still inoperative. (*Erie R. R. Co. v. New York*, 233 U. S. 671; *Southern Railway Co. v. Railroad Commission of Indiana*, 236 id. 439, 448; *Chicago Rock Island, etc., Railway v. Hardwick Elevator Co.*, 226 id. 426, 435.) We are unable to find in the statute justification for the claim by the Attorney General that the provisions of the Federal act in question do not apply to canal traffic or State terminals. The terms of the statute are in conflict with this view. Nor do we find in the act any proviso or exception covering the subject matter of this order under review.

Relief can not be had from this conclusion because of the fact that the State of New York is a sovereign State and owns the canal. No power over the canal itself, or its operation, is assumed in this act of Congress; i.

assumes to control the interstate commerce between the canal carrier and the rail carrier. The State is not doing the work of a common carrier. The common carriers operating upon the canal are those persons and corporations, owning boats or leasing them, who are engaged in carrying freights thereon, and the required connection and railroad facilities are for the use and benefit of such common carriers. There can be no conflict between the Federal government and a State in the regulation of interstate commerce, the absolute control of which commerce is given by the United States Constitution (Art. 1, sec. 8, subd. 3) to the Federal Government. There would be a curious conflict should it be held that one common carrier (the railroad) was under the control of Congress in this respect and a connecting carrier (the State) was not.

II

IN ORDER TO INVOKE THE JURISDICTION OF THE COMMISSION IT WAS NOT NECESSARY THAT THE STATE OF NEW YORK SHOULD BE A COMMON CARRIER. ITS OWNERSHIP AND MAINTENANCE OF THE TERMINAL QUALIFIED IT AS A PROPER PARTY UNDER THE STATUTE TO FILE THE COMPLAINT

Throughout the record it is emphasized that the State of New York is not a common carrier. The Commission said, "The State is not a common carrier of commerce, intrastate or interstate, but it furnishes the canal and its facilities without charge to common carriers by water." (R. 24.) The two intervenors "are among the canal carriers which do not file tariffs with us or with the State Com-

mission." (R. 25.) The District Court said, "The intervention³ (so-called) of the two private corporations above-named was almost farcical." (R. 130.)

In concluding the case the District Court said, "Now let it be admitted that the words 'may be' (supra) authorized the commission to step in upon the mere hope or possibility that a connection will make or attract business. But it seems to me quite clear that when the statute declares that when it comes to directing the operation of tracks a determination shall be made of what shall be 'paid to or by either carrier'—such a statute necessarily implies and plainly means that there shall be before the commission, and both subject to its jurisdiction, two carriers. This is an impossibility when one party and the only substantial party before the commission was the State of New York." (R. 133.) (Assigned as Error X, R. 145.)

The history of the times disclose that water competition was stifled by the ownership and management of water lines by the rail carriers. The latter thus indirectly owned and controlled the docks. *United States v. Pacific & Arctic Railway*, 228 U. S. 87, 102, 104. The Panama Canal Act was designed to break up that situation by divorcing completely the water and rail lines and compelling physical connection between rail lines and docks of water lines for through movement of traffic.

³ The Commission held that under the rules and practices before that body the objection to the form of the intervention at the time it was allowed was not well taken. (R. 23.)

The amendments of 1920 broadened the terms of the statute in order more effectively to accomplish that purpose.

The all-embracing provisions of the statute ⁴ declare that—

- (a) When property
- (b) may be or
- (c) is
- (d) transported
- (e) from point to point
- (f) in the United States
- (g) by rail and water
- (h) through the Panama Canal
- (i) or otherwise,
- (j) the transportation
- (k) being by a common carrier or carriers,
- (l) and not entirely within the limits of a single State,
- (m) the * * * Commission shall have jurisdiction of such transportation and
- (n) of the carriers,
- (o) both by rail and by water,
- (p) which may or do engage in the same,
- (q) in the following particulars, * * * :
 - (a) To establish
 - (b) physical connection
 - (c) between the lines of the rail carrier

⁴Appendix A.

- (d) and the dock at which interchange of passengers or property is to be made
- (e) by directing the rail carrier to make suitable connection
- (f) between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way,
- (g) or by directing either or both the rail and water carrier,
- (h) individually
- (i) or in connection with one another,
- (j) to construct and connect with the lines of the rail carrier
- (k) a track or tracks to the dock.

The Commission shall have full authority to

- (a) determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and
- (b) it may, either in the construction or the operation of such tracks,
- (c) determine what sum shall be paid to or by either carrier: * * *

To establish

- (a) through routes and maximum joint rates
- (b) between and over such rail and water lines,

(c) and to determine all the terms and conditions under which such lines shall be operated

(d) in the handling of the traffic embraced.

To establish

(a) proportional rates,

(b) or maximum, or minimum,

(c) or maximum and minimum proportional rates,

(d) by rail

(e) to and from the ports to which the traffic is brought,

(f) or from which it is taken

(g) by the water carrier, and

(h) to determine to what traffic and

(i) in connection with what vessels and

(h) upon what terms and conditions

(i) such rates shall apply.

Do the facts bring the case within the terms of the statute?

1. *When property may be or is transported.*

The evidence shows that a tremendous volume of freight traffic both interstate and intrastate is interchanged by Barge Canal carriers. (R. 24.) The New York Central never claimed there would be no property to transport. Its strenuous resistance to furnishing the transportation service is that too much traffic will move *via* the rail and water routes. The District Court said, "Now let it be admitted that the words 'may be' (*supra*) authorized the Commission to step in upon the

mere hope or possibility that a connection will make or attract business." Naturally if there were no property that *may be* transported the New York Central would have no transportation service to render with respect thereto. Its resistance to the complaint was based on its fear of loss of business.

2. *From point to point in the United States by rail and water through the Panama Canal or otherwise.*

Freight moving from the west and destined to Troy, Albany, New York City, or any other point on the Barge Canal, and moving *via* New York Central to Buffalo and Barge Canal to destination, fulfils this requirement.

3. *The transportation being by a common carrier or carriers and not entirely within the limits of a single State.*

New York Central Railroad and a common carrier on the Barge Canal—any one of the many listed—fulfil this requirement. (R. 24, 124.)

4. *The Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same.*

Meaning thereby that *any* carrier, whether by rail or water whensoever and wheresoever, who participates to any extent, however slight, shall be subject to regulation by the Interstate Commerce Commission. There is no mandate that the Commission may not act unless it may lay its hands on *two or more* carriers. The statute means *any and all*—singly, jointly, or collectively. Obviously there may be one carrier conducting both the rail

and water transportation; or two carriers, one conducting the rail and the other the water transportation; and so on. But there is no mandate that the Commission may not lay its hands on one, or that there shall be brought before the Commission more than one carrier before it may act.

Jurisdiction to do what?

5. *To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made.*

That is not a mandate that there shall be *two* carriers. "Rail carrier" means the New York Central; "the dock" means Erie Basin Terminal. They are as completely identified as if each had been specifically mentioned by name. It is the *dock* at which the interchange is to be made. The statute is singularly silent on *ownership*. If ownership of the dock by a common carrier is a condition precedent, then all of the large municipal docks and piers at the great port cities would fall without this specification of the statute, including the Commonwealth Pier at Boston and the miles of piers and docks constructed and maintained by the City of New Orleans.

How?

6. *By directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way.*

The direction shall be laid on the rail carrier, not on the *owner* of the dock or on any water carrier. Whence did the District Court derive its limitation that *two carriers* were essential? Certainly not from those words. Here again the New York Central and Erie Basin Terminal are as completely identified as if each had been specifically mentioned. The specifications enumerated by the statute identify each of them completely.

7. *Or by directing either or both the rail and water carrier, individually.*

This would directly negative the construction of the District Court that the Commission must at all times have before it at least *two carriers*. The words "either * * * individually" do not include two.

8. *Or in connection with one another.*

The disjunctive "or" is twice used. "Either *or both*" and "*individually or in connection with one another,*" are words used to broaden the jurisdiction of the Commission and not to restrict the same.

9. *To construct and connect with the lines of the rail carrier.*

"The rail carrier" means the New York Central.

10. *A track or tracks to the dock.*

The word "dock" in this statute means exactly what it says and does not mean the sovereign State of New York, or a common carrier, or the *owner* of the dock. It means the dock from which traffic "*may be or is transported* * * * by a common carrier or carriers."

The remaining provisions fully authorize the Commission "to prescribe, when necessary, the terms and conditions upon which the connecting tracks shall be operated, or, either in the construction or the operation of those tracks, to determine what sum shall be paid to or by either carrier." (R. 29.) The District Court says these words require that two carriers shall be before the Commission. Counsel for New York Central, as later appears, defeated the State in her own courts by successfully maintaining that she was operating the Terminal as an instrumentality of interstate transportation (Point III, *infra*).

The Court knows judicially that the connection of tracks to docks and the operations of handling cars thereover to shipside is not an uncommon occurrence in transportation. In every large port city such operations are conducted on a vast scale. Norfolk, Gary, Cleveland, and Galveston are conspicuous examples. The Court likewise knows judicially that in frequent, if not all, instances the service of switching and handling of cars to and from the docks is performed by the rail carriers either directly or by their terminal switching agencies and that the rail carriers furnish the cars. The Commission found:

As the State and the Canal carriers have no railroad motive power or cars, and it would be impracticable and uneconomical for them to purchase and operate the same, the practical effect of this refusal is to pre-

clude any interchange of traffic at the terminal between the rail and canal carriers. (R. 26.)

Concurring, Commissioner Eastman said (R. 35) :

No water line is equipped to operate over these rails, or could so equip itself without disproportionate expense. The New York Central is so equipped and can operate over these rails, which the State has laid, as readily as it now operates over many other similar spur-track connections in Buffalo.

District Judge Cooper, dissenting, said (R. 136) :

Water carriers are not usually equipped to operate railroad tracks. It follows, therefore, that if the connection here is to be operated at all, it must be by the petitioner railroad, which is equipped for such operation.

Even if this be viewed as an order which compelled the rail carrier to extend its tracks, to which view the writer does not subscribe, nevertheless by other sections of the same statute such power resides in the commission. This power is contained in paragraph 21 of section 1 of the act. Such of the cases cited by counsel for the railroad company on the theory that the order of the Commission requires an unlawful extension of its tracks, as were decided since the act in question, are not in point and the physical situation in the cases cited are clearly distinguishable from the situation in the instant case. The prior cases, of course, can have no bearing.

III

ERIE BASIN TERMINAL IS A FACILITY OF INTERSTATE
TRANSPORTATION

In their brief filed in this Court in opposition to the petition for a writ of certiorari in No. 773, *Public Service Commission v. New York Central*, October Term, 1921, counsel for the New York Central argued that the subject matter of the case was one which belonged peculiarly to the field of interstate commerce and subject to regulation by the Interstate Commerce Commission; thus:

The State of New York is especially aiming to construct elevators and to carry a large percentage of the grain from the Great Northwest to the Seaboard. It proposes to form a connection with many of the trunk lines of the United States which are carrying interstate commerce, and to exchange traffic with them. It provides docks, warehouses, loading and unloading apparatus, and railroads for transporting property from rail to boat, and vice versa. It also provides facilities for receiving freight from the cities and towns of the State of New York and transporting the same to other cities and towns in the State of New York and to cities and towns in other States, and to steamers plying with foreign countries, and vice versa.

In their brief in No. 773, *supra*, in which they further argued that the Federal Government alone had the power to regulate the subject matter in controversy, the counsel for the New York Central

cited the following language of this court from *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 305:

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character; that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier, *United States v. Sioux City Stock Yards Co.*, 162 Fed. Rep. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts, *Union Stockyards Co. of Omaha v. United States*, 169 Fed. Rep. 404; *Belt Railway Co. of Chicago v. United States*, 168 Fed. Rep. 542; and under the Twenty-Eight Hour Law, *United States v. Sioux City Stock Yards Co.*, *supra*.

They concluded their Brief in No. 773 with the following:

When the State engages in business as a common carrier it assumes the same obliga-

tions and liabilities which are incident to that business when it is conducted by individuals. (*Michie on Carriers*, Vol. 1, page 3, Sec. 1.)

District Judge Cooper, dissenting, in the instant case, said (R. 135) :

The rail carrier is inconsistent in contending in this court that there is no interstate commerce, even potential, which would pass through this terminal and that, therefore, the Interstate Commerce Commission had no jurisdiction to make the order in suit after prevailing in the State courts on the ground that there was interstate commerce and that, therefore, the State public service commission had no jurisdiction.

"The nature of the use to which it is devoted when built," and not the ownership or circumstances surrounding its construction, is the test of the extent to which a track becomes a transportation facility and subject to regulation as such.

In *Union Lime Co. v. Chicago & Northwestern*, 233 U. S. 211, 221, 222, this Court, speaking through Mr. Justice Hughes, said:

It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track and the nature of the use to which it is devoted when built.

A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in *Hairston v. Danville & Western Rwy. Co.*, *supra* (p. 608): "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago &c. R. R. Co. v. Porter*, 43 Minnesota, 527; *Ulmer v. Lime Rock R. R. Co.*, 98 Maine, 579; *Railway Company v. Petty*, 57 Arkansas, 359; *Dietrich v. Murdock*, 42 Missouri, 279; *Bedford Quarries Co. v. Chicago &c. R. R. Co.*, 175 Indiana, 303.

While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Rwy. Co. v. Nebraska*, 217 U. S.

196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the State power.

IV

THE OPINION OF THE DISTRICT COURT NOT ONLY ERRONEOUSLY MADE OVER AND CONSTRICTED THE FINDINGS OF THE COMMISSION, BUT ITS ADDED FAILURE TO RECOGNIZE THE STATE OF NEW YORK AS A PARTY WITH ANY RIGHT OR STANDING BEFORE EITHER THE COMMISSION OR THE COURT WAS LIKEWISE ERRONEOUS

Section 500 of the Transportation Act (Ap. A, p. 49) provides:

It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

The following expressions will indicate the approach to the case made by the District Court (italics ours):

Upon its property the State has constructed what *from the meager evidence is a sort of freight yard.* (R. 127.)

The intervenors filed no further pleading; an official or agent of each testified before the Commission, *apparently at the instance of the State of New York. This was the extent of their intervention.* (R. 129.)

The intervention (so called) of the two private corporations above named was almost farcical. Both of them averred (in their application for intervention) that they were common carriers of goods, &c., upon the barge canal. But no evidence was given that either of these concerns was or ever had been engaged in interstate commerce. (R. 130.)

It is always advisable, and sometimes vital, to get behind the forms and formal parties of a litigation and ascertain who is the actual person insisting on the demand in suit, what that person wants, and why it is wanted. (R. 130.)

In form this suit has nothing to do with the State of New York, but the truth is that the State is by long odds the person or party most seriously involved and it is the maker of the essential demand herein. (R. 130.)

Description of that demand may be approached by another quotation from the dis-

senting opinion of Kellogg, J., in 198 A. D. 436. * * *

* * * The State did build the terminal, it owns it, and has made of the Erie Basin terminal *what may fairly be called a railroad yard*. But in the sense of operating or rendering useful the railroad yard that is the important part of that terminal, it never has done and does not intend to do the same. *This case results from an effort to make someone else do what it has declined to do.* (R. 130.)

If the State should enter upon common carriage, and for that purpose acquire rolling stock, etc., it might well *pro tanto* lay aside its sovereignty and subject itself to the jurisdiction of mere regulatory authority whether of its own creation, of another State, or of the Nation. (R. 130.)

But New York has done nothing of this kind. It did petition the Interstate Commerce Commission to grant the order now attacked, *but it distinctly did not prefer that petition as a common carrier*, much less as one subject to the regulatory jurisdiction of the Commission itself. (R. 130.)

Therefore one way, and an accurate way, of putting the question before us is to inquire whether at the request of a sovereign State which is not a common carrier *but is beyond and superior to the regulatory or coercive power of the Commission*,—that body can lawfully compel a carrier undoubtedly

subject to its jurisdiction to operate the State's property, i. e., *to take over the management of the State's Erie terminal which the State itself refuses to operate as a railroad yard.* (R. 130.)

It is here essential to state that *I regard the order complained of as having been made solely on the demand and at the suit of the State of New York.* (R. 130.)

* * * *that State having taken the trouble to make a freight yard along side the barge canal and contiguous to the tracks of the New York Central Railroad desired that railroad to take over and operate that freight yard in order to attract business to its canal.* (R. 131.)

It is a fair summary of what this order means that the plaintiff railroad shall extend its Buffalo yards so as to make the State's terminal an integral portion thereof. *Practically the railroad is commanded to enter upon the State's property and establish a freight depot with appropriate switching and distributing service at the canal edge.* (R. 131.)

The entire cost of this operation is laid upon the plaintiff railroad; also (so far as shown by this record) the entire cost of upkeep of terminals, tracks, etc. The charges to be made for these services seem to be at present left to be fixed by the plaintiff railroad, subject, however, to the regulatory power of the Commission. (R. 131.)

The courts of New York have decided that the Public Service Commission of that

State can not do what the State wants, and the Supreme Court has not affirmed that ruling, but declined to disturb it; consequently we accept it. But no court has said as yet that in a proceeding such as was actually brought by the State before the Interstate Commerce Commission that body was empowered to give the State what it wanted. (R. 131.)

Could the Commission lawfully require the Railroad to extend its lines by undertaking the management and operation of another's railroad property,—especially when that other is a sovereign State and not judicially compellable to respond for its own wrongs or to maintain in operative condition the property to be managed by the railroad. (R. 132.)

So I cull from the statute words which seem to me fairly to express the idea which the majority of the Commission thought authorized the order now complained of. (R. 132.)

Now, let it be admitted that the words "may be" (*supra*) authorized the Commission to *step in upon the mere hope or possibility that a connection will make or attract business*. But it seems to me quite clear that when the statute declares that when it comes to directing the operation of tracks a determination shall be made of what shall be "paid to or by either carrier"—such a statute necessarily implies and plainly means that there shall be before the Commission, and both subject to its jurisdiction, two carriers. This is an impossibility when

one party and the only substantial party before the Commission was the State of New York. (R. 133.)

District Judge Cooper, dissenting, gauged the case in such a way as fully to meet the intention of the Congress in enacting the statute (R. 135):

Even if none of the boats of the intervening water carriers themselves move interstate or transport freight which moves in interstate transit, nevertheless the rail carrier is an interstate carrier, and the statute would be satisfied by the carrying of freight which crosses the State line on the defendant railroad's cars and passes through this terminal for water transportation for points in the State of New York having water connections. It would also be satisfied with shipments originating in New York State carried by water carrier to the terminal in question and then transported over the railroad lines to other States.

One of the plain purposes of the Federal statute is the supplying of facilities for the exchange of interstate water and rail traffic where no such facilities now exist, or in other words for the promotion of interstate commerce by compelling interchange between rail and water carriers, one or both being engaged in interstate commerce.

Of course, there can be no interstate or other commerce by rail and water carrier through this terminal if no one operates the connecting tracks on the terminals. It is clear, however, that there is potential inter-

state commerce at this point. The statute does not require the present existence of such interstate commerce by rail and water carrier or carriers. The statute is satisfied if there "may be" such commerce. There being potential rail and water interstate commerce through this terminal and a physical connection between the lines of the rail carrier and the tracks on the terminal dock to which the water carrier has access, it was within the power of the Interstate Commerce Commission to require the connection and the tracks on the terminal to be operated by the rail carrier.

The very ground of the decision in the State courts was that the potential traffic through this terminal was interstate, in part at least, and, therefore, the Interstate Commerce Commission and not the public-service commission of the State had jurisdiction. (*Peo. ex rel. N. Y. Central v. P. S. Com.* 198 App. Div., 436, 442, affirmed 232 N. Y. 606 without opinion.)

V

THE ORDER OF THE COMMISSION IS NOT INVALID BECAUSE IT EMBRACES "ALL TRAFFIC, INTERSTATE AND INTRASTATE," THAT MAY BE TRANSPORTED TO OR FROM THE TERMINAL OVER THE NEW YORK CENTRAL LINES. (R. 7.)

Paragraph XXIV of the petition (R. 12) charges that the order is null and void in that it expressly purports to require the New York Central to perform the operating service and furnish

transportation with respect to intrastate traffic although the statute refers only to transportation "not within the limits of a single State."

If the Commission had jurisdiction at all it had jurisdiction to enter the order in the form in which it was drawn. To have excluded intrastate commerce therefrom would have been a clear discrimination against the latter. This Court has repeatedly held that when in the exercise of the regulatory power conflicts arise between Federal and State authorities out of which preferences and discriminations result the Federal law is supreme over all. (*Minnesota Rate Cases*, 230 U. S. 352; *The Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *State of New York v. United States*, 257 U. S. 591; *United States v. Village of Hubbard*, 266 U. S. 474; *United States v. State of Tennessee*, 262 U. S. 318; *Dayton-Goose Creek Railway v. United States*, 263 U. S. 456.)

Here again the State, having invoked the jurisdiction of the Commission, may not well complain of the order which the Commission made in its favor. Whether, as between the State of New York and the New York Central Railroad, the State may yet regulate the purely intrastate commerce which may move over the canal and the facilities in connection therewith is a question which does not arise on this record.

VI

CONCLUSION

The decree should be reversed and the cause remanded with directions to dissolve the permanent injunction and to dismiss the petition for want of equity.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1926.

APPENDIX A

THE STATUTE

Section 6 of the Interstate Commerce Act, as amended by Section 11 of the Act of August 24, 1912, commonly known as "The Panama Canal Act" (ch. 390, 37 Stat. 566, 568), and by Sections 412 and 413 of the Transportation Act of 1920 (ch. 91, 41 Stat. 483), now provides:

That section six of said Act to regulate commerce, as heretofore amended, is hereby amended by adding a new paragraph at the end thereof, as follows:

(13) "When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of

the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.”¹

¹ The original paragraphs (a) and (c) as contained in Section 11 of the Act of August 24, 1912, for which the language of the Transportation Act of 1920 was substituted, are as follows:

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of

“(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

“(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

“(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such

this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

* * * * *

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

Section 500 of the Transportation Act of 1920 (ch. 91, 41 Stat. 499), under "Title V. Miscellaneous Provisions," also provides:

SEC. 500. It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suit-

able for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

APPENDIX B

The following excerpts from the Interstate Commerce Act in which water lines or transportation by water lines and the facilities relating thereto are printed for ready reference.

That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, *or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment*; or

(b) The transportation of oil or other commodity, *except water* and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water. (41 Stat. 474.)

To the transportation of passengers or property by a carrier *by water* where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its *port-to-port water rates* or out of its proportional through rates, any switching, terminal, *lighterage*, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, *lighterage*, or *corporate limits of a port terminal or district*. (41 Stat. 474.)

The term "railroad," as used in this Act, shall include all bridges, car floats, *lighters*, and *ferries* used by or operated in connection

with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of persons or property * * *. The term "transportation," as used in this Act, shall include locomotives, cars, and other vehicles, *vessels*, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *. (41 Stat. 474, 475.)

That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, *water*, or otherwise. (40 Stat. 272.)

And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad *or water* or otherwise to obey strictly and conform promptly to such orders. (40 Stat. 273.)

Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the

operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuitry, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely *potential water competition* not actually in existence. (41 Stat. 480.)

Whenever a carrier by railroad shall in competition with a *water route or routes* reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the *elimination of water competition*. (41 Stat. 480.)

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly through any holding company, or by stockholders or directors in common, or

in any other manner) *in any common carrier by water operated through the Panama Canal or elsewhere* with which said railroad or other carrier aforesaid does or may compete for traffic or any *vessel* carrying freight or passengers upon said *water route* or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense. (37 Stat. 566, 567.)

Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of *any vessel or vessels already in operation*, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. (37 Stat. 567.)

If the Interstate Commerce Commission shall be of the opinion that any such existing specified *service by water other than through the Panama Canal* is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the *route by water* under consideration, the Interstate Commerce Commission may, by order, extend the time during which such *service by water* may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such *water carrier* shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same

manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation. (37 Stat. 567.)

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or *by water* when a through route and joint rate have been established. (34 Stat. 586.)

* * * The Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, * * * to be charged (or, in the case of a through route where one of the carriers is a *water line*, the maximum rates, fares, and charges applicable thereto) * * *. (41 Stat. 485.)

The Commission may, * * * establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a *water line*, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a *water line*.

* * * nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly *by water*, and any transportation *by water* affected by this Act shall be subject to the laws and regulations applicable to *transportation by water*. (41 Stat. 485.)

In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a *water line*), require any carrier by railroad, without its consent, to embrace such route. * * * (41 Stat. 485.)

When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly *by water* within the continental United States, subject to this Act. * * * (41 Stat. 488.)

Provided, That if the loss, damage, or injury occurs while the property is in the custody of a *carrier by water* the liability of such *carrier* shall be determined by and under the laws and regulations applicable to *transportation by water*, and the liability of the initial carrier shall be the same as that of *such carrier by water*. (41 Stat. 494.)

Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first to baggage carried on *passenger trains or boats, or trains*

or boats carrying passengers. * * * (39 Stat. 442.)

That the common carrier, railroad, or *transportation company* issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof. (34 Stat. 595.)

That every common *carrier by water* in foreign commerce, whose vessels are registered under the laws of the United States shall file with the Commission, within thirty days after this section becomes effective and regularly thereafter as changes are made, a schedule or schedules showing for each of its *steam vessels* intended to load general cargo. * * * (41 Stat. 497.)

Upon application of any shipper a carrier by railroad shall make request for, and the *carrier by water* shall upon receipt of such request name, a specific rate applying for such *sailing*, and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, *port charges*, if any, which accrue in addition to the *vessel's rates* and are not otherwise published by the railway, as in addition to or absorbed in the railway rate. *Vessel rates*, if conditioned upon quantity of shipment, must be so stated and separate rates may be provided for carload and less than carload shipments. The *carrier by water*, upon advices from a carrier by railroad, stating that the

quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation from unsold space in such *steam vessel* as shall be required for its transportation and shall so advise the carrier by railroad, in which advices shall be included the latest available information as to prospective sailing date of such *vessel*. (41 Stat. 497.)

When any consignor delivers a shipment of property to any of the places so specified by the Commission to be delivered by a railway carrier to one of the *vessels* upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the *transportation by water* from and for a *port* named in the aforesaid schedule, the railway carrier shall issue through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, *water transportation, and port charges*, if any, not included in the rail or *water transportation charge*; but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the *vessel*. The Commission shall, in such manner as will preserve for the *carrier by water*, the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the *vessel* as a part of its undertaking as a common carrier. (41 Stat. 498.)

CONTENTS

	Page
A. Committee report:	
Representative Adamson, Committee on Interstate and Foreign Commerce, House of Representatives, Report No. 423, 62d Cong., 2d sess., 1911-1912.....	1
B. Testimony:	
Witness Gilbert.....	4
Witness Dinan.....	4
Witness Croly.....	4, 5
C. Statutory definitions of "carrier," "railroad," and "transportation".....	7
D. Extensions and industrial tracks, distinction between.....	13

CASES CITED

<i>Baltimore & Carolina Steamship v. Atlantic Coast Line</i> , 49 I. C. C. R. 176, 180.....	9
<i>Charleston & Norfolk Steamship v. Chesapeake & Ohio</i> , 40 I. C. C. 382, 386.....	9
<i>Georgia v. Chattanooga</i> , 264 U. S. 472, 480, 481.....	11
<i>In re Wharfage Facilities at Pensacola</i> , 27 I. C. C. 252, 256, 260.....	10
<i>New England Divisions case</i> , 261 U. S. 184, 201, 202.....	12
<i>New York Central v. General Electric</i> , 219 N. Y. 227.....	13
<i>People ex rel. New York Central v. Public Service Commission</i> , 198 App. 436.....	8
<i>Stafford v. Wallace</i> , 258 U. S. 495, 516.....	8
<i>State of New York v. United States</i> , 257 U. S. 591.....	10
<i>Terminal Regulations at Boston</i> , 38 I. C. C. 643, 646, 648.....	9
<i>Texas & Pacific Railway v. Gulf, etc., Ry.</i> , 270 U. S. 266.....	12
<i>United States v. Union Stock Yards</i> , 226 U. S. 286, 303.....	8
<i>Village of Hubbard v. United States</i> , 266 U. S. 474, 477.....	11

In the Supreme Court of the United States

OCTOBER TERM, 1926

THE UNITED STATES OF AMERICA AND INTERSTATE
Commerce Commission, appellants

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

I

Opposing counsel cite the language of Senator Jones (Washington), a member of the Senate Committee on Interoceanic Canals, who spoke to the Panama Canal Bill in Committee of the Whole. (Br. 20.)

Representative Adamson, from the Committee on Interstate and Foreign Commerce of the House of Representatives, submitted the report on the operation of the Panama Canal, which contains the following statement on Section 11 (House Reports, Vol. 2, 62nd Cong., 2d Session, 1911-1912, Report No. 423):

(1)

Believing that the function of the canal management to maintain equality and fairness "in respect of conditions and charges of traffic" is limited to the operation and supply, and must be applied at the canal itself, and there only, without attempting to adjust inequalities or equalize conditions in different countries of the world, the committee nevertheless recognizes that the coast-to-coast business through the canal, under existing navigation laws, will be a part of our coastwise trade. It is competent in this or an independent bill to legislate concerning coastwise traffic. It would not be fair to discriminate among our coastwise vessels, all of which are important. The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the act to regulate commerce, the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing,

and more necessary purpose of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lake and rivers. *This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in the foreign trade. By that means the benefits of the canal can be distributed through the interior and enable the entire country to enjoy some good therefrom. Instead of competing with themselves by running vessels through the canal the railroads can perform the more noble and valuable service of connecting on either coast with coastwise vessels passing through the canal, and, by joint rates and through routes, afford convenient schedules and fair rates and conditions of commerce to the people living many hundreds of miles inland from both coasts. (Italics ours.)*

II

Counsel for New York Central state the "evidence before the * * * Commission may be summarized briefly." Their summary consists of three printed pages. (Br. 10.) The agreed narrative (R. 52, 53) of the evidence covers 71 pages of the printed record (R. 55-126), and could not be adequately summarized in three pages. For instance, the argument "the order in no way either creates or *promotes* the through transportation of

freight by rail and water" (Br. 21), and "Their (the barge lines) boats or barges appear to be of that 'tramp' class mentioned in the concurring opinion of Mr. Commissioner Eastman" (Br. 29), appears to run counter to evidence which counsel for New York Central do not include in their summary. Part of the foundation of New York Central's case appears to be that there are no interstate water carriers to move the traffic, and if there were there is no interstate traffic to move. The heavy volume of tonnage and the manner in which it is handled would strongly indicate (R. 26) that the craft on the canal (R. 24, 124) stood higher than the "tramp" class.

Witness Gilbert (for State):

"The interstate commerce is overwhelmingly in the majority; it might be approximated at 75% interstate and 25% intrastate." (R. 60.)

Witness Dinan, U. S. R. R. A. (for New York Central):

"The canal is a competitor of the New York Central. I would say it is a competitor, or at least it will be some day, practically across the entire State from Buffalo to Troy." (R. 109.)

Witness Croly, U. S. R. R. A. (for New York Central):

"If we delivered it to the dock at Buffalo, say, from the Larkin plant, we would just get the haul across the City." (R. 114.)

Witness Croly, U. S. R. R. A. (for New York Central):

"I think that connection would deprive us of a considerable traffic which we are now carrying." (R. 114.)

Witness Croly, U. S. R. R. A. (for New York Central):

"A good deal coming from the east will come into Buffalo to be unloaded there at the terminal and then to be put in our freight cars and switched around the City of Buffalo for use in Buffalo—to our detriment * * *. With canal rates as low as they are compared with rail rates, if a shipper is located where they can get additional facilities by the use of the canal without charge, it would certainly be our loss. If you followed that system, a considerable business is sure to develop there. If you could relieve the shipper by this, I should imagine that considerable business is going to develop at your terminal by the use of our shifting arrangement, but we would lose more than we can afford to at the present time. That is my carefully considered opinion." * * * (R. 115.)

Witness Croly, U. S. R. R. A. (for New York Central):

"Q. To take it to the canal terminal in the manner you prescribe by draying would subject them to additional expense?

"A. Why are you so anxious to save them expense and not care so much about us?

"Q. I am not asking that.

"A. That is just what it means. What you give to them you take away from us.

That is the only objection that we have."
(R. 117.)

III

That the Erie Basin Terminal constitutes the dock of the Barge canal boats is not denied. We thus have the water lines, the rail carrier, and the dock. The statute is fulfilled. To take the case out of the statute merely because the State of New York owns the dock and the canal and independent parties own and operate the boats is the problem of New York Central. The dock is not a private dock. It long has been and now is a facility of transportation; it never was anything else. The argument that the order of the Commission must fall because *two* carriers, one rail and one water, engaged, *at the time*, in interstate commerce, were not before the Commission, does not meet the situation. They say "that both a common carrier by rail and a common carrier by water" should be before the Commission "and subject to its jurisdiction" (Br. 19). The District Court said the words "paid to or by either carrier" necessarily imply and plainly mean "that there shall be before the Commission, and both subject to its jurisdiction, *two carriers*." (R. 133.) The District Court, after emphasizing the State of New York was not a common carrier, "common or otherwise," and that the intervention of the Barge Canal lines was almost farcical, held there was no common carrier on the water side of the dock, and, therefore, the Commission was

without jurisdiction. Such a narrow view failed adequately to consider the facts and circumstances or to give effect to the statute.

1. New York Central put the State of New York out of her own courts on the ground that the entire subject matter belonged to the field of interstate commerce. (Gov. Main Brief, 20, 33.)

2. The statute defines "carrier," "railroad" and "transportation," in an unbroken paragraph.

The term "common carrier" as used in this act shall include * * * all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, *and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any*

contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. (Ch. 91, 41 Stat. 474.)

3. The performance of the service by New York Central instantly brings the Terminal within the terms of the statute. *People ex rel. New York Central v. Public Service Commission*, 198 App. Div. 436; *United States v. Union Stock Yard*, 226 U. S. 286, 303, in which it was held that a concern which conducted "the customary stockyard operations" was subject to the act; and *Stafford v. Wallace*, 258 U. S. 495, 516, "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another."

IV

The suggestion is made in the brief of opposing counsel (Br. 37) that the counsel for the Government did not copy the proviso of paragraph (13), "its omission being represented by * * * at the end of clause (c)." The proviso appears on page 47 of the Government's main brief and relates solely to the *construction* required by the Commission. The question of the *construction* of these tracks and who shall pay therefor is not in this case. Service over these tracks is what the Commission's order directs. Nor is there any question involved

of compensation. If the order directing the New York Central to *render* the service is sustained, it may be presumed the Company will publish a tariff in compliance therewith. It will be time enough then to determine the reasonableness or unreasonableness of the arrangement and the compensation.

In *Baltimore & Carolina Steamship Company v. Atlantic Coast Line*, 49 I. C. C. R. 176, 180, the Commission said:

Here there is already a physical connection across an existing dock between the vessel which may berth at the dock of the rail carrier and the tracks of that carrier and all that is needed is the establishment of proportional rates.

That is precisely the situation here. All that the Commission's order requires is service which the rail carrier refuses to perform.

In *Charleston & Norfolk Steamship Company v. Chesapeake & Ohio*, 40 I. C. C. R. 382, 386, the Commission said:

In the case presented by this record *there is no vessel to move traffic, no terminal to handle it*, and nothing to guide us to any conclusion as to what the terms and conditions with respect to the rates should be. (*Italics ours.*)

In *Terminal Regulations at Boston*, 38 I. C. C. 643, 646, 648, 649, the directors of the port of Boston by an expenditure of about \$3,650,000 constructed the pier known as Commonwealth Pier.

"The ultimate purpose of the State was so to improve the terminal facilities and operations at Boston as to attract vessels and trade to that port in competition with other Atlantic ports. * * * All parties admit the superiority of Commonwealth Pier, which is characterized by defendant's counsel as 'perhaps the most splendid pier in the world.' " The Boston & Maine was prohibited from discriminating in favor of the Commonwealth Pier as against other piers in Boston.

In re Wharfage Facilities at Pensacola, 27 I. C. C. 252, 256, 260, physical connection existed between the rails of the railroad and the dock of the steamship company. It was held that the wharfage facilities were embraced within the statute and that the railroad company could not discriminate in making deliveries to one steamship and not to the other.

Opposing counsel cite Chapter 746, Laws of 1911, State of New York, to the effect that "the Barge Canal Terminals shall include all tracks upon the terminals, and that the terminals shall be operated and forever remain under the management and control of the State." (Br. 33, 34.) This argument was also emphasized by the District Court, but is utterly unsound in the light of *State of New York v. United States*, 257 U. S. 591, in which it was held that the State charter contract which bound the New York Central not to charge more than two cents a mile for passenger carriage between Albany and Buffalo could not prevail against

the power of Congress to regulate commerce. That ruling was reaffirmed in *Village of Hubbard v. United States*, 266 U. S. 474, 477 (see footnote). That the State of New York may not mold into the Interstate Commerce Act as limitations its laws relating to the Erie Basin Terminal is likewise settled in *Georgia v. Chattanooga*, 264 U. S. 472, 480, 481. When the State of New York submits to the Interstate Commerce Act its standing is not above that of the New York Central; nor has the State ever claimed otherwise.

V

As approximately 75% of the traffic on the canal is interstate, the interchange during 1922 by canal carriers of about 1,106,000 tons of freight at Buffalo with the lake carriers is ample proof, if such proof is needed, that these canal carriers are now engaged in interstate commerce. The statutory requirement "When property may be or is transported" is fulfilled. The evidence already referred to shows that the traffic will move over the Terminal whenever the New York Central will render the service for which the order provides.

The argument that each and every water line carrier operating in the Barge Canal and which may offer to interchange traffic with the New York Central at the dock should be made parties to the proceeding before the Commission has jurisdiction to act has been rejected.

In *New England Divisions Case*, 261 U. S. 184, 201, 202, this Court said:

The argument is, that if the Commission acts at all in apportioning the joint rate, its action is invalid unless it prescribes the proportion to be received by each of the connecting carriers. For this contention there is no warrant either in the language of the Act, in the practice of carriers, or in reason. The duty imposed upon the Commission does not extend beyond the need for its action. If the real controversy is merely how much of the joint rate shall go to carriers east of Hudson River and how much to carriers west, there is nothing in the law which prevents the Commission from letting the parties east of the river, and likewise those west of it, apportion their respective shares among themselves. It is obviously of no interest to the western carriers how those of New England decide to apportion their shares; nor is it of interest to the eastern carriers how those west of the Hudson divide the share apportioned to that territory. If on these matters the carriers interested can reach an agreement and no public interest is prejudiced, clearly, there is no occasion for the Commission to act.

VI

The argument that the order of the Commission "constitutes a requirement that the railroad make an extension of its line" (Br. 38) is met by *Texas &*

Pacific Railway v. Gulf, etc., Ry., 270 U. S. 266, in which the differences between extensions and industrial tracks are clearly drawn. The tracks upon which to spot cars for loading in the Terminal are no more an extension of the line than any other spur or switch track to an industry or siding for loading on the line of the New York Central, or the tracks on any other dock or pier at any port where freight is interchanged between rail and water lines. If the switch tracks do constitute an extension, the Commission has found that the service will be in the public interest. The Commission said (R. 29) :

All that is asked is that defendant, with its already available motive power and other equipment, provide the transportation service and perform upon the Terminal tracks the operating service necessary to an interchange of traffic at the Terminal. * * * (R. 29.) We find it to be in the public interest that defendant should perform the transportation and operating services in accordance with the prayer of the complaint. (R. 30.)

Opposing counsel cite *New York Central v. General Electric Company*, 219 N. Y. 227. There the controversy was between the carrier and one of its shippers, the latter claiming an allowance for intra-plant switching movements which it performed. The lack of similarity between the two cases may be illustrated by the lack of similarity between the

General Electric Company plant and the operations thereof and the Erie Basin Terminal and the operations thereof.

VII

The judgment should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER 25, 1926.

○

Office Executive Clerk, U. S.

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U. S. DEPARTMENT OF JUSTICE

RECEIVED

In Matter of _____

John Edgar Hoover, Special Agent

Against _____

The United States of America are interested
in the _____

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SUBJECT INDEX

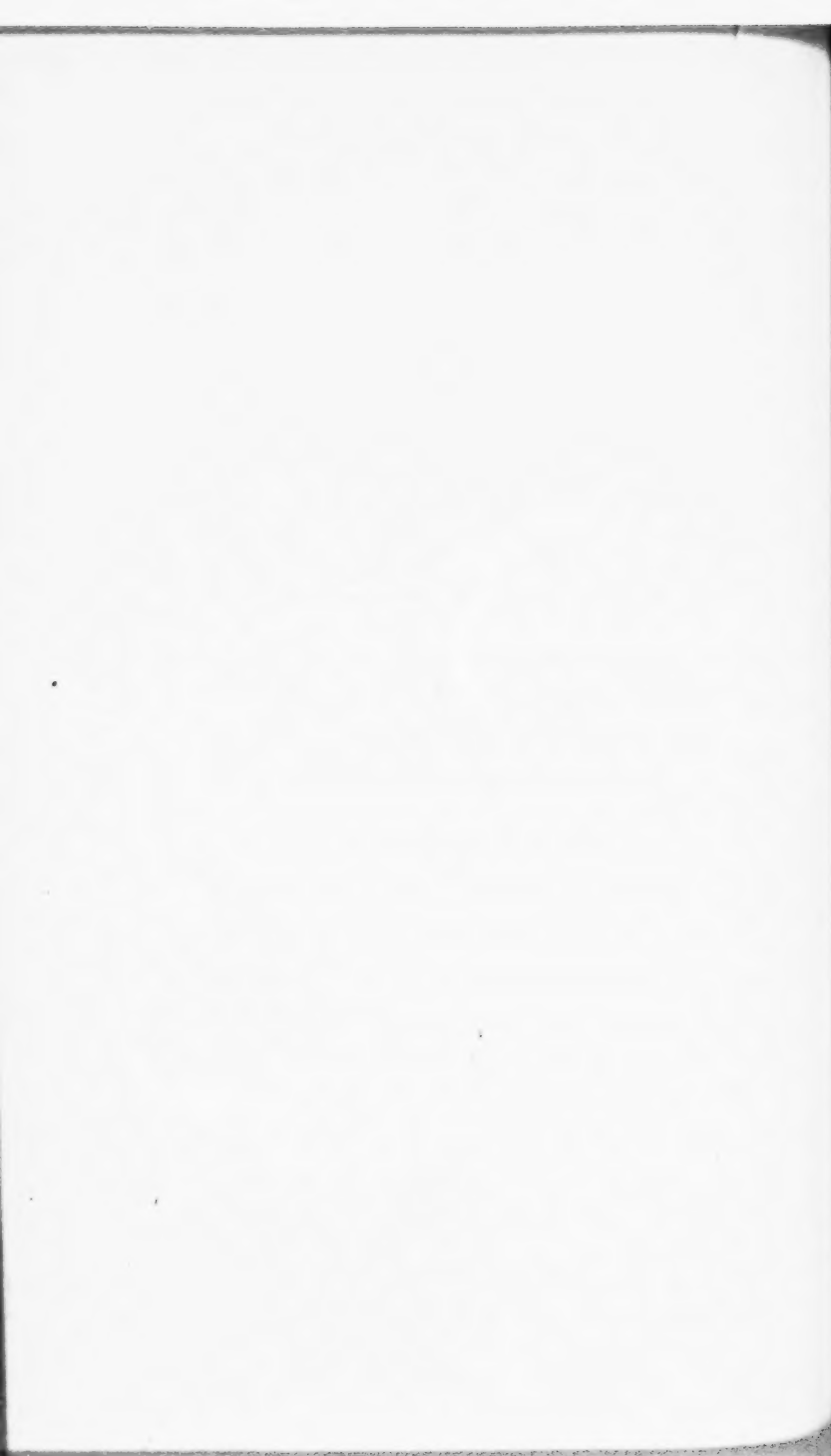
STATEMENT	Page
	1-8

ARGUMENT:

I. The order of December 9, 1924, was not made by the Commission solely on the demand and at the suit of the State of New York	8-14
II. The lower court erred in holding that the order of December 9, 1924, is invalid for the reason that the Commission did not have before it two carriers subject to its jurisdiction and prescribe the sum of money to be paid to or by either carrier in connection with the operation covered by the order	14-35

TABLE OF CASES CITED

<i>Interstate Commerce Commission v. Goodrich Transit Company</i> , 224 U. S. 194.....	24
<i>N. Y. Central R. R. Co. v. United States, et al.</i> , 13 F. (2d) 200.....	1, 8-9,
	12-13, 16
<i>People v. Public Service Commission</i> , 191 N. Y. S. 636; 236 N. Y. 606.....	22-23, 27-28, 29, 30, 32-35
<i>Wisconsin, Minnesota and Pacific Railroad v. Jacobson</i> , 179 U. S. 287.....	24-25



In the Supreme Court of the United States

OCTOBER TERM, 1926

In Equity, No. 284

THE UNITED STATES OF AMERICA AND INTERSTATE
Commerce Commission, appellants

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
appellee.

BRIEF FOR INTERSTATE COMMERCE COMMISSION

STATEMENT

The opinion in this case of Circuit Judge Hough, concurred in by District Judge Knox, 13 F. (2d) 200, and the dissenting opinion of District Judge Cooper, 13 F. (2d) 203, will be found on pages 127 to 137, inclusive, of the record.

This is an appeal from a final decree of the District Court of the United States for the Northern District of New York, annulling and setting aside an order of the Interstate Commerce Commission dated December 9, 1924, the body of which reads:

This case being at issue upon complaint and answer on file, and having been duly

heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the city of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

It is further ordered, That said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty,

going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom.

And it is further ordered, That this order shall continue in force and effect until the further order of the commission. (Rec. 53-54.)

The order is directed against the appellee herein and was made pursuant to a complaint filed in the office of the Commission on March 22, 1923, by the State of New York and Edward S. Walsh, Superintendent of Public Works of that State. The prayer of said complaint is in part as follows:

1. That the New York Central Railroad Company provide a transportation service between the Erie Basin Barge Canal public terminal in the City of Buffalo, and shippers located on its tracks, in the City of Buffalo, N. Y., between the Erie Basin Barge Canal public terminal in the City of Buffalo, and shippers located on its tracks at any other point within the State of New York and between the Erie Basin Barge Canal public terminal in the City of Buffalo, and shippers located at any other point in the State of New York, on the tracks of any other railroad company, with which the New York Central Railroad Company can interchange traffic.

2. That such transportation service shall include the furnishing of necessary rolling stock by the New York Central Railroad Company, for all traffic moving from the Erie Basin Barge Canal public terminal and

from all shippers located on its tracks in the City of Buffalo or any other point on its tracks within the State of New York to the Erie Basin Barge Canal public terminal, the operation by the New York Central Railroad Company upon the railroad tracks within such Erie Basin Barge Canal public terminal by such railroad's own motive power and servants, all rolling stock going to or coming from said Erie Basin Barge Canal public terminal; and the spotting, placing and removing of rolling stock therein. (Rec. 18-19.)

At the first of the two hearings had in the proceeding before the Commission a joint petition of intervention was presented by the Rochester Terminal & Canal Corporation and the Interwaterways Line, Incorporated, common carriers by water operating canal boats, tugs, and other transportation equipment upon the barge canal, and, over the objection of appellee, the examiner in charge of the hearing permitted the petition to be filed. This was followed by a motion by counsel for complainants that the complaint be so amended as to make the interveners, and also an industrial concern included in the caption but not in the text of the petition, additional parties complainant, and that the prayer be so amended as to embrace an interchange of all traffic, interstate and intrastate, that can possibly reach the Erie Basin terminal over appellee's line. Over appellee's further objection

the examiner granted the motion and treated the complaint as so amended. (Rec. 55-56.)

Pertinent provisions of law are paragraph (13) of section 6 and paragraphs (10) and (21) of section 1, of the Interstate Commerce Act, which read as follows:

(13) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and con-

ditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign

country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neg-

lects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

The assignments of error are eleven in number, but may, we think, be summarized as follows:

The District Court erred in holding that the order of December 9, 1924, is invalid: (1) Because it was made solely on the demand and at the suit of the State of New York, and, (2) because the Commission did not have before it two carriers subject to its jurisdiction and prescribe the sum of money to be paid to or by either carrier in connection with the operation covered by the order. (Rec. 140-141.)

ARGUMENT

I

THE ORDER OF DECEMBER 9, 1924, WAS NOT MADE BY THE COMMISSION SOLELY ON THE DEMAND AND AT THE SUIT OF THE STATE OF NEW YORK

In holding that the order was made by the Commission solely on the demand and at the suit of the State of New York, the lower court, among other things, said:

It is here essential to state that I regard the order complained of as having been made solely on the demand and at the suit of the State of New York. The intervention (so

called) of the two private corporations above named was almost farcical. Both of them averred (in their application for intervention) that they were common carriers of goods, &c., upon the barge canal. But no evidence was given that either of these concerns was or ever had been engaged in interstate commerce. On the contrary the president of one of them deposed that his concern was "not in the interstate carrying business," and the manager of the other stated on oath that his sole interest in this proceeding was that he sometimes did not get "cast-bound business (from Buffalo) because there was no service from the terminal to the industries located in the Buffalo switching district." In other words he sometimes failed to get some intrastate business. The substance of the matter is that no common carrier engaged or seeking to engage in interstate business asked the Commission to do what it did. (Rec. 130-131.)

This view, however, does not appear to us to be justified by the record. In paragraph VII of appellee's petition herein it is admitted that at the first of the two hearings had in the proceeding before the Commission two carriers by water, upon application, were permitted to and did intervene and become parties complainant. (Rec. 5-6.) And pertinent language included in the Commission's report is as follows:

A preliminary question should be noticed. Defendant filed an answer in which, among

other things, it challenged the sufficiency of the complaint upon the grounds that neither complainant is a common carrier by water or by rail, and that no such carrier by water as is necessary to an exercise of the jurisdiction invoked had been made or had become a party to the proceeding. At the first of the two hearings had in the case the challenge was renewed, whereupon a joint petition in intervention in behalf of the Rochester Terminal & Canal Corporation and the Interwaterways Line, Incorporated, common carriers by water operating canal boats, tugs, and other transportation equipment upon the barge canal, was tendered. Over defendant's objection, the examiner permitted the petition to be filed. This was followed by a motion by counsel for complainants that the complaint be amended to make the interveners, and also an industrial concern included in the caption but not in the text of the petition, additional parties complainant; and that the prayer be amended to embrace an interchange of all traffic, interstate and intrastate, that can possibly reach the Erie Basin terminal over defendant's line. Over defendant's further objection the examiner granted the motion, and treated the complaint as so amended. The hearing thereupon proceeded.

Defendant's objections were upon the ground that the effect of the intervention and the amendment was to enlarge the issues, to meet which the time prescribed by our Rules of Practice had not been accorded

defendant for preparation of its defense. The intervening petition contains no allegations respecting the merits, but defendant contends that, because of the alleged jurisdictional defect of parties, the complaint presented no justiciable issue at all when filed, and that the intervention or amendment, if allowable, presented for the first time a cognizable cause of action. Therefore, it is contended, defendant was called upon to meet a new issue, in contravention of its rights. On brief, the further contention is made that, inasmuch as the complaint thus set up no cause of action, there was pending before us no proceeding in which an intervention could be had; but it is admitted that if the intervention or amendment was properly allowed it can not now be contended that defendant has not had opportunity to meet the issues thus presented.

As above intimated, and because of the questioned action of the examiner, we assigned the case for further hearing, with an interval of time considerably in excess of that provided by our Rules of Practice. Complainants, interveners, and defendant were represented at the further hearing, but adduced no additional evidence. Counsel for defendant merely renewed a motion made at the prior hearing that none of the evidence thus far taken be considered in behalf of the intervening parties, which motion counsel for complainants resisted.

Whether the additional parties be regarded as interveners or as complainants by

amendment (for convenience, they will be treated as interveners), and assuming for the moment that they were necessary parties, their inclusion in support of the complaint has, in the light of the further hearing had, denied to defendant the benefit of no meritorious defense or adequate time or opportunity to prepare and present it. Defendant has also at all times and in all instances had full opportunity to cross-examine the opposing witnesses. Incidentally, a large part of the evidence, including all that has been submitted for defendant, is embraced in a transcript of the proceedings before the State commission, introduced by complainants at the first hearing without objection by defendant. Even granting that the examiner erred at the time, the ultimate result has been the same as if the intervention or an appropriate amendment had been filed with and allowed by us seasonably before the first hearing. It is not disputed that defendant has had its day in court, and we think the objection not well taken. (Rec. 22-23.)

Also, upon this point, Judge Cooper in his dissenting opinion said:

Two water carriers intervened in the proceeding, viz: Rochester Terminal and Canal Corporation and Interwaterways Line, Inc., by a petition which appears in the record.

The Commission held that their intervening petition was regular and in accordance with its rules. The Commission was authorized to make its own rules and was compe-

tent to determine that the intervention was in accordance with such rules. The Court should be concluded by the Commission's determination. For this Court to hold otherwise would almost usurp the power of the Commission to make and interpret its own rules.

The intervenors described themselves as common carriers in their intervening petition and the Commission so found. The fact that they did not file a schedule of rates, or tariff of charges, with the Commission is not serious. A plea of nonfiling would not be available as a defense in an action against them. Assuming that the Court is not bound by the determination of the Commission as to the character of these water carriers, the evidence is sufficient to show that they are common carriers transporting freight moving in interstate transit. (Rec. 134-135.)

Descriptions of the equipment and operations of said interveners, contained in the record, are as follows:

Interwaterways Line, Inc.—Operates 5 steel motor ships, of 1,500 tons capacity each, in a bulk-cargo service between New York and Buffalo.

Rochester Terminal & Canal Corporation.—Operates 10 450-ton wooden barges, with three power units. Shipments contracted for movement to and from all New York State canal and Long Island Sound ports. Merchandise shipments between New

York and Rochester handled upon prior arrangement. (Rec. 124-125.)

We think the matters referred to above show clearly that the order of December 9, 1924, was not made by the Commission solely upon the demand and at the suit of the State of New York.

II

THE LOWER COURT ERRED IN HOLDING THAT THE ORDER OF DECEMBER 9, 1924, IS INVALID FOR THE REASON THAT THE COMMISSION DID NOT HAVE BEFORE IT TWO CARRIERS SUBJECT TO ITS JURISDICTION AND PRESCRIBE THE SUM OF MONEY TO BE PAID TO OR BY EITHER CARRIER IN CONNECTION WITH THE OPERATION COVERED BY THE ORDER

Appellee admits, in paragraph I of its petition (Rec. 2), that it is a common carrier and subject to the provisions of the Interstate Commerce Act, and, since the order is directed only against appellee and simply requires it to furnish a transportation service upon the Erie Basin barge-canal public terminal and between the terminal and other points, for the purpose of facilitating the transportation of traffic from and to the terminal to and from points on the lines of appellee and on the lines of appellee's connections, it is difficult to understand why any common carrier other than appellee was a necessary party to the proceeding before the Commission upon which the order is based.

We have seen that the Commission may exercise the authority conferred upon it by paragraph (13) of section 6 "When property may be or is transported from point to point in the United States by

rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State," and that such a condition existed at the time the order was made is shown by evidence contained in the record and referred to in the Commission's report as follows:

During 1922 the canal carriers interchanged about 1,106,000 tons of freight at Buffalo with the lake carriers, of which about 550,000 tons consisted of ex-lake grain. In addition, they brought about 38,000 tons of local traffic into Buffalo and took about the same amount outbound. Approximately 75 per cent of the traffic on the canal is interstate. Traffic officials of five of the principal industries at Buffalo testified in behalf of complainants. Two of them have their own docks, but desire to make less-than-barge shipments via the Erie Basin terminal. Of the remainder, two have water connections with the terminal, but have no docks at their plants. The traffic manager of the Buffalo Chamber of Commerce estimates that the volume of traffic that would move over the connection, if the proposed service were established, would range from 100,000 to 125,000 tons per year. One of the principal shippers estimates that its traffic alone would amount to 20,000 tons annually. (Rec. 26.)

In holding that the order is invalid for the reason, among others, that the Commission did not

have before it two carriers subject to its jurisdiction, the lower court said:

Now let it be admitted that the words "may be" (*supra*) authorized the Commission to step in upon the mere hope or possibility that a connection will make or attract business. But it seems to me quite clear that when the statute declares that when it comes to directing the *operation* of tracks a determination shall be made of what shall be "paid to or by *either carrier*," such a statute necessarily implies and plainly means that there shall be before the Commission, and both subject to its jurisdiction, two carriers. This is an impossibility when one party and the only substantial party before the Commission was the State of New York. (Rec. 133.)

The meaning of this language of the lower court does not appear to us to be entirely clear; but, taken in connection with language of the court quoted under point I of this brief, we understand the meaning to be that neither of the common carriers by water which intervened in the proceeding before the Commission was then a common carrier within the meaning of section 1 of the Interstate Commerce Act; and that such a construction, as a practical matter, would eliminate the words "in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten," contained in section 13 of the Act, and that the construction is otherwise

unreasonable, are shown in the concurring opinion of the present Chairman of the Commission, Commissioner Eastman, from which we quote as follows:

One of the chief points made in the dissenting opinion is that the words "a common carrier or carriers," in the above-quoted paragraph, do not have their ordinary meaning but must be interpreted in the light of the provisions of section 1 of the interstate commerce act. By such reasoning, which is fully set forth and need not here be repeated, the conclusion is reached that we have no jurisdiction under paragraph (13) of section 6, unless the carrier by water which may or does, in connection with a rail carrier, transport property in interstate commerce "from point to point in the United States * * * through the Panama Canal or otherwise," is under common control or management with some carrier by rail, or has entered into an arrangement with some rail carrier for the continuous carriage or shipment of passengers or property.

* * * * *

Under the reasoning of the dissenting opinion, the powers conferred by this paragraph and its lettered subdivisions could be exercised only—

1. Where the water line is under common control or management with some rail carrier, in which case there would seldom, if ever, be need for the exercise of such powers; or—

2. Where the water line has already made an arrangement with some rail carrier for continuous carriage or shipment, or, in other words, has already been able to accomplish, in substantial part at least, the object which paragraph (13) was designed to further.

Thus, the conditions precedent to the exercise of the powers conferred would rarely exist. It is evident that this construction of the law would reduce it almost to a nullity and certainly to an absurdity. * * *

It is true that paragraph (3) of section 1 of the interstate commerce act provides that the term "common carrier" as used in the act "shall include," among others, "all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire." It is also true that the reference to transportation "as aforesaid" relates back to the part of paragraph (1) of the same section which states that—

the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

But paragraph (13) of section 6 was injected into the act to regulate commerce by the Panama Canal act after the former was amended in 1910, and with the provision

that the jurisdiction thus conferred should be "in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten." Moreover, throughout the interstate commerce act, when reference is made to a common carrier which comes within the definition of section 1 and is subject to the general provisions of the act, it is customary to use the words "common carrier subject to the provisions of this Act," or words of similar effect, unless the context makes their use unnecessary. In that part of paragraph (13) of section 6 which is in question, such language is not used, but the reference is merely to "a common carrier or carriers"; nor does the context imply such restriction. It is a reasonable inference that it was not the intent to confine or restrict the ordinary meaning of these words within the limitations of section 1.

This conclusion is strengthened by the fact that there are other provisions of the act where the words "common carrier" are plainly used in their ordinary meaning, unrestricted by section 1. Thus, in section 25, added February 28, 1920, certain duties are imposed upon "every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States." In paragraph (9) of section 5, railroad companies are prohibited from having any interest whatsoever "in any common carrier by water operated through the Panama Canal or elsewhere." And in subdi-

vision (d) of paragraph 13 of section 6, it is provided that if a rail carrier enters into an arrangement for the handling of through business with "any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise," we may require it to enter into similar arrangements with other similar steamship lines. A further illustration will be found in the provisions of paragraph (24) of section 1, noted in the dissenting opinion. Section 15a contains its own special definition of the word "carrier," as does section 20a, the latter definition including "any corporation organized for the purpose of engaging in transportation by railroad subject to this Act." Until the amendment of 1920, the definition in section 1 was merely this: "The term 'common carrier' as used in this Act shall include express companies and sleeping car companies." It is evident that this definition was not intended to be all inclusive; nor is the definition in its present form. In the case of water transportation there is particular reason for employing the words "common carrier" in their ordinary meaning, in order to distinguish lines so operated from the many cargo vessels, such as tramp steamers and the like, which are not operated as common carriers. The conclusion that the words are so used in paragraph (13) of section 6 is further strengthened by the fact that any other construction would result, as I have shown, in reducing the provisions of that paragraph and its let-

tered subdivisions to a virtual nullity. (Rec. 31-33.)

The holding of the lower court that, in a case of this kind, the Commission must have before it two carriers subject to its jurisdiction is based entirely, as above shown, upon its conclusion that the Commission may not direct the operation of the terminal tracks unless at the same time it determines the sum of money to be paid to or by either carrier in connection with such operation, but this does not appear to us to be a proper construction of subdivision (a) of paragraph (13) of section 6 above set forth. By this subdivision the Commission is authorized: (1) To require a physical connection between the tracks of the rail carrier and the tracks leading to the dock used by the water carrier; (2) to determine and prescribe the terms and conditions upon which the connecting tracks shall be operated, and, (3) to determine the sum of money to be paid to or by either carrier in connection with such operation.

The order of the Commission does not contain any requirement in connection with the making of a physical connection, for the reason that such connection already exists and was made pursuant to a contract entered into in May, 1919, by and between the State of New York on the one hand and the Director General of Railroads, as operator of appellee's railroad, on the other hand (Rec. 27), and, while the Commission in its order prescribed

the terms and conditions under which the terminal tracks are to be operated to the extent of providing that the transportation services involved shall be performed by appellee through its own employes and with equipment furnished by appellee, the Commission did not determine or prescribe the sum of money to be paid to or by either carrier in connection with the operation, and there is no language in such subdivision which requires it to do so. In this connection the pertinent language of the subdivision is:

* * * and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier.

This language simply confers upon the Commission authority to determine and prescribe the sum of money to be paid to or by either carrier, but where, as here, the terminal tracks are to be operated entirely by the rail carrier and compensation for such operation is to be provided for in transportation rates to be prescribed by that carrier it is not necessary for the Commission to determine or prescribe the sum of money to be paid to or by either carrier.

In speaking of the authority conferred upon the Commission by the subdivision mentioned, in *People v. Public Service Commission*, 191 N. Y. S. 636, the Supreme Court of New York, Appellate Division, Third Department, said:

This act of Congress not only gives to the Interstate Commerce Commission power to establish physical connection between the lines of the rail carrier and the dock, but also to direct the rail carrier and the water carrier singly or jointly "to construct and connect with the lines of the rail carrier a track or tracks to the dock"; also full authority to determine and prescribe the terms and conditions upon which these tracks shall be operated and by whom, * * *. (Id. 639-640.)

That the Commission might have prescribed proportional rates to be exacted by appellee for the interstate transportation from and to the terminal docks will appear from an examination of subdivision (c) of paragraph (13), but such prescription is not required as an initial matter. If petitioner establishes rates for such transportation which hereafter are complained of as unreasonable or otherwise unlawful the Commission is authorized by sections 13 and 15 of the Act, after hearing upon complaint, or upon its own initiative without complaint, to require such changes in the rates as may be necessary to render them lawful.

By requiring appellee to transport both interstate and intrastate traffic from and to the terminal dock the Commission did not render the order invalid for the reason that such a requirement is not a regulation of intrastate commerce. The contention made by appellee in this connection appears to us to be the same in principle as a contention

which was advanced in *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U. S. 194, wherein was involved an order of the Commission requiring a common carrier engaged in interstate commerce to file in the Commission's office a report of interstate business and also of other business done by the carrier. In holding the contention to be without merit, this court, among other things, said:

* * * It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. * * *. (Id. 211.)

To the same effect see *Wisconsin, Minnesota and Pacific Railroad v. Jacobson*, 179 U. S. 287, wherein, in holding to be valid an order of the Railroad Commission of Minnesota requiring two carriers by railroad to make track connections with each other, this court said:

* * * To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective

lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in nowise regulate such commerce within the meaning of the Constitution. (Id. 295.)

We think the matters to which we have referred establish that in making the order of December 9, 1924, the Commission did not exceed the authority conferred upon it by paragraph (13) of section 6, but it is not necessary to rely entirely upon that paragraph, because the authority exercised by the Commission in requiring appellee to furnish the transportation services covered by said order is specifically conferred upon the Commission by paragraphs (10) and (21) of section 1 hereinbefore set forth. We have seen that the car service the Commission is authorized by paragraph (21) to require a carrier by railroad to furnish, as defined in paragraph (10), includes the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, and that paragraph (21) also authorizes the Commission to require a carrier by railroad to extend its line or lines.

It is true that the extension may not be required unless the Commission " finds, as to such extension, that it is reasonably required in the interest of

public convenience and necessity," but such a finding is contained in the Commission's report, from which we quote as follows:

We find it to be in the public interest that defendant should perform the transportation and operating services in accordance with the prayer of the complaint, as amended, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal; and an order to that end will be entered. (Rec. 30.)

Appellee calls attention to the fact that the complainants in the proceeding before the Commission asked for relief under paragraph (13) of section 6, but, in so far as complainants are concerned, the relief asked for, and not complainants' conclusion as to the provisions of law under which the relief may be granted, is the matter of importance. That in making the order the Commission did not consider itself confined to the authority conferred upon it by paragraph (13) of section 6 is shown by the Commission's report, from which we quote as follows:

* * * All that is asked is that defendant, with its already available motive power and other equipment, provide the transportation service and perform upon the terminal tracks the operating service necessary to an interchange of traffic at the terminal. Under the terms of the statute our power to require it is distinct and complete. Under another section of the act we have power to

require a railroad to extend its line, and for obvious reasons this includes authority to require the carrier to operate the extension.

* * *. (Rec. 29-30.)

As a matter of substance, the order under consideration here is the same as the order the validity of which was involved in *People v. Public Service Commission, supra*, and concerning the latter order the Supreme Court of New York, among other things, said:

The order requires the relator to provide transportation service between this Barge Canal terminal, on the one hand, and shippers located along its tracks in the city of Buffalo, and shippers located along its tracks at any other point in the state of New York, and shippers located at any other point in the state of New York on the tracks of any other railroad company, with which the relator can interchange traffic, on the other hand. It provides that the relator shall furnish the necessary rolling stock for all traffic at this terminal and operate the same (including the spotting, placing, and removing of cars) by its own motive power and servants; that the relator shall "file tariffs with the Commission for all service into and out of said terminal, and over its connecting lines."

The connection having been made between the terminal tracks and the relator's line, the relator is willing to place cars on and take cars from a proper interchange track, off its

own lands, for this terminal, but it refuses to furnish engines and rolling stock and to operate them through the terminal; it refuses to spot cars on the docks and to do switching at the terminal beyond the proposed interchange track. Thus the issue here is raised.

The relator makes two principal objections: (1) That Public Service Commissions Law (Consol. Laws, c. 48) Section 49, subd. 3, par. (a), amended by Laws 1917, c. 805, as amended by chapter 541 of the Laws of 1920, which took effect May 5, 1920, is unconstitutional and beyond the power of the Legislature to enact; and (2) that the federal Transportation Act of 1920 authorizes the Interstate Commerce Commission to make regulations for interchange of traffic between water carriers and rail carriers and excludes the Public Service Commission of the state from power or authority to act in this respect.

The order made by the Public Service Commission is entirely within the provisions of the aforesaid section of the Public Service Commissions Law. The state legislature had power, "under its reserved control over corporations," to enact the statute requiring the relator, its creature, to assume the burden imposed. * * *. (Id. 638.)

As shown in the Commission's report (Rec. 23) the decree of said Supreme Court was affirmed, without opinion, by the Court of Appeals of the State of New York (236 N. Y. 606), and, since the

carrier referred to as the relator in the New York case is the appellee here, it is difficult to understand how consistently it can be contended, as is contended by appellee in paragraph XXV of its petition (Rec. 13), that the Commission's order of December 9, 1924, is in conflict with Chapter 746 of the Laws of 1911, or with any other law, of the State of New York.

But, while the order of the New York Commission and the statute law pursuant to which the order was made were held to be constitutional by the courts, including the highest court, of that State, the opinion was expressed that the jurisdiction the State Commission otherwise might have exercised had been vested exclusively in the Interstate Commerce Commission by section ⁶(13) of the Interstate Commerce Act. In this connection the court said:

Congress having exercised its authority to regulate interstate commerce by the direction and control of connections between rail carriers and water carriers, the entire subject of such connections is removed from the operation of the authority of the state, and the power of the state to regulate such connections and the operation of them ceases to exist; when the federal government has exercised its power, it covers the whole field, and even if, in certain details, the state act differs from the federal act, such state act is still inoperative. (Id. 640.)

In describing what it stated to be the principal purpose sought to be accomplished by the enactment of section ⁴(13), language used by the lower court was as follows:

It is well known that this section took its present shape principally to facilitate and advantage traffic through the Panama Canal. But it is so drawn as to be of much wider import. * * *. (Rec. 132.)

That the wider import referred to was intended by Congress is indicated by the report of the Committee on Interstate and Foreign Commerce of the House of Representatives, dated March 16, 1912, printed as Report No. 423, Sixty-second Congress, second session, from which we quote as follows:

This section also provides for the connection of railroads in through routes and joint rates with water carriers in all domestic traffic, in accordance with their practices in connection with vessels engaged in foreign trade. By that means the benefits of the canal can be distributed through the interior and enable the entire country to enjoy some good therefrom. Instead of competing with themselves by running vessels through the canal, the railroads can perform the more noble and valuable service of connecting on either coast with coastwise vessels passing through the canal, and, by joint rates and through routes, afford convenient schedules and fair rates and conditions of commerce to the people living many hundreds of miles inland from both coasts. (Rec. 31-Note.)

And such intention is further indicated by section 500 of the Transportation Act, 1920, the first paragraph of which reads:

It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

That the tracks on the Erie Basin Barge Canal public terminal, although owned by the State of New York, are available for use by appellee is shown by the report of the Commission from which we quote as follows:

* * * In the instant case the docks and other terminal facilities for interchange at Buffalo are the property of the State of New York, but they are fully available to all canal craft and appear to be adequate for the purpose contemplated by the complainant.

In the light of the State's attitude in the case and its manifested desire to promote the greatest practicable use of the canal, it would follow that, if the requisite construction and track connection had not already been accomplished, the first of the powers granted us under the section hereinbefore outlined could have been exercised upon an invocation of that relief, the concurrence of the State being assured, if other essential elements were established of record. By the

same token, since the complete terminal facilities are unreservedly tendered for the necessary use by defendant and such canal lines as may desire to participate in the traffic that would be affected, it is competent for us in an appropriate case to enter an order on the merits which, incidentally or directly, would preclude a severance of the existing connection pursuant to the contract provision before mentioned. (Rec. 28.)

And that, as a practical matter, the terminal tracks must be operated by appellee, if they are operated at all, is shown in the dissenting opinion of Judge Cooper, who, in this connection, said:

True, the terminal dock and the tracks thereon, including the connecting track, belong to the State of New York, but the State of New York is not a common carrier (*Peo. ex rel. N. Y. Central vs. Pub. Ser. Comm. supra*), and it has no equipment for the operations specified in the order of the Interstate Commerce Commission.

If the terminals and tracks thereon are part of the canal system of the State, then the State, if it could render such transportation service, would be required to render the service gratis, for Section 9 of Act VII of the State Constitution prohibits the imposing of "tolls"—on persons or property transported on the canals.

The Act under which the funds for the barge canal terminals and tracks thereon were authorized, the terminals and railroad

tracks constructed, and their use regulated, in substance puts these canal facilities, along with the canals of the State, under the jurisdiction of the Canal Board of the State.

Chap. 746, of the Laws of 1911, approved by referendum of the People of the State.

Water carriers are not usually equipped to operate railroad tracks. It follows, therefore, that if the connection here is to be operated at all, it must be by the petitioner railroad, which is equipped for such operation. (Rec. 135-136.)

At the hearing of oral argument in the lower court counsel contended that appellee had not been protected adequately against injury it may suffer in operating the terminal tracks if they are not maintained properly by the State of New York, and this contention was answered by Judge Cooper as follows:

The question of subjecting the railroad company to liability for damages arising from operating the tracks upon the property of the State is not a serious one in the determination of the matter now before the Court. The State maintains its canals, and no assumption can fairly be made that it will not properly maintain its canal terminals. The contract for the construction and operation of the terminal tracks in question between the State and the Director General of Railroads, while the railroads were operated by the Federal Government, expressly provided that the State should maintain the

tracks on this Terminal. This contract is probably not now in effect.

Even if the State should not properly maintain this Terminal, and the tracks should become dangerous to operate, such tracks might well be maintained by the railroad and, if not collectible from the State, the expense of such maintenance, like the expense of maintaining its own right of way, might become an important factor in the fixing of the rates to be charged for the service, and may also be apportioned between the rail and water carriers.

Moreover, the jurisdiction of the Interstate Commerce Commission is continuous and it may from time to time alter or modify the terms on which the connection shall be operated. If the State should not maintain its terminal tracks, the Interstate Commerce Commission has the power to rescind its order if the service required would, because of non-maintenance by the State, be unduly burdensome to the railroad, or to the water carriers, or to both.

No presumption may be indulged in that the railroad will not be treated fairly by the Commission. (Rec. 137.)

And, in calling attention to what he regarded as inconsistency between different contentions made on behalf of appellee, Judge Cooper further said:

The rail carrier is inconsistent in contending in this Court that there is no interstate commerce, even potential, which would pass through this Terminal and that, therefore,

the Interstate Commerce Commission had no jurisdiction to make the order in suit after prevailing in the State Courts on the ground that there was interstate commerce and that, therefore, the State Public Service Commission had no jurisdiction. (Rec. 135.)

For the reasons above set forth we insist that the decree of the lower court should be reversed and that the petition of appellee herein should be dismissed.

Respectfully submitted.

P. J. FARRELL,

For Interstate Commerce Commission,

Appellant.

SEPTEMBER, 1926.

○

FILED

OCT 21 1926

WM. B. STANSBURY
CLERK

BRIEF FOR APPELLEE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 284

**THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,**

APPELLANTS,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

APPELLEE.

**Appeal from the District Court of the United States
for the Northern District of New York.**

CHARLES O. PAULDING,

New York City.

ROBERT E. WHALEN,

Albany, N. Y.,

Counsel for Appellee.

**ALBANY
THE AMERICAN COMPANY, PRINTERS
1926**

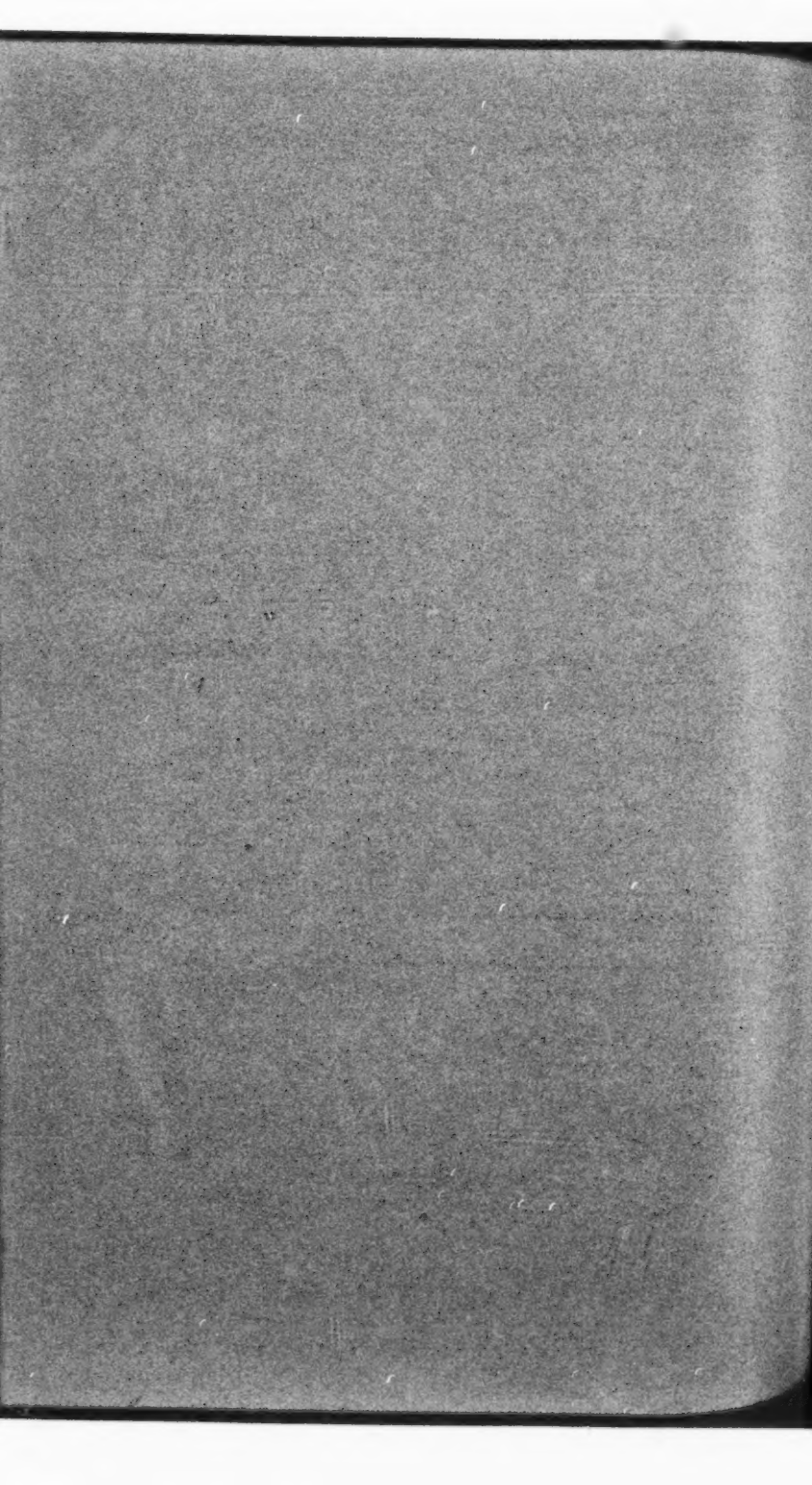


TABLE OF CONTENTS AND SUMMARY

Statement of the Case.....	PAGE. 7
Argument	14

I.

Since the Order was made solely under the provisions of Section 6, Subdivision 13, of the Interstate Commerce Act, its validity depends upon whether, in the circumstances, such provisions conferred upon the Commission power to make the Order..... 14

II.

As Section 6, Subdivision 13, of the Interstate Commerce Act confers jurisdiction upon the Commission only "when property may be or is transported from point to point in the United States by rail and water through the Panama Canal, or otherwise, and not entirely within the limits of a single state," the Order is void because it is predicated upon no finding that property is or may be transported in the manner described and because there is no competent evidence to support such a finding..... 16

III.

It is essential to the exercise by the Commission of the jurisdiction conferred upon it by Section 6 that there be before it and subject to its jurisdiction both the common carrier or carriers by rail and the common carrier or carriers by water which do or may engage in the transportation by rail and water; and there being no common carrier by water subject to the Commission's jurisdiction in the present proceeding, the Commission was without authority to issue the Order..... 19

(A) The plain purpose of Subdivision 13 of Section 6 is to promote through transportation by rail and water; and the accomplishment of this purpose requires that both a common carrier by rail and a common carrier by water be before the Commission and subject to its jurisdiction..... 19

(B) The various provisions of Subdivision 13 of Section 6 of the Interstate Commerce Act, by their language, clearly require the presence of a common carrier by water, in order to give the Commission jurisdiction to exercise the powers conferred therein. 22

(C) The Interstate Commerce Commission has itself heretofore exercised the powers conferred upon it by Subdivision 13 of Section 6 of the Interstate Commerce Act in cases where both the rail carrier and the water carrier, between which it was sought to have freight interchanged, have been before it 25

(D) No common carrier by water was properly before the Interstate Commerce Commission in this proceeding and subject to its jurisdiction. 27

IV.

The Order far transcends the jurisdiction conferred upon the Commission by Subdivision 13 of Section 6, which is only with respect to the transportation of property by common carriers by rail and water between points in the United States and not within the limits of a single state. Hence it is null and void. 30

(A) The Order is not limited to transportation from point to point by common carriers by rail and water within the provisions of the Interstate Commerce Act 31

(B) The Order is not limited to transportation of freight from point to point in the United States. 31

(C) The Order is not limited to transportation of freight "not entirely within the limits of a single state" 31

(D) The Order requires the railroad to perform transportation service between the Erie Basin Terminal and points and shippers located on the lines of the railroad's connections. 32

V.

The Order cannot be sustained as a determination and prescription of the terms and conditions upon which connecting tracks shall be operated, for in substance it requires the railroad to extend its line. 33

(A) The Order does not direct or prescribe the terms and conditions of operation. 33

(B) The tracks upon which the railroad is directed by the Order to operate not being "connecting tracks," within the meaning of Subdivision 13 of Section 6 of the Interstate Commerce Act, the operation ordered by the Commission amounts in effect to an extension of the railroad's line, which the Commission by this section of the act is not authorized to require. 36

Conclusion 41

LIST OF CITATIONS

Cases	Page
Baltimore & Carolina S. S. Co. v. A. C. L. R. R. Co., 49 I. C. C. 176.....	26
Charleston & Norfolk S. S. Co. v. C. & O. Ry. Co., 40 I.C.C., 382.....	26
Chicago Junction Case, 264 U. S., 258.....	27
Colonial Navigation Co. v. N. Y. N. H. & H. R. R. Co., 50 I. C. C., 625....	26
In re Wharfage Facilities at Pensacola, Fla., 27 I. C. C., 252.....	26
Interstate Comm. Comm. v. L. & N. R. R., 227 U. S., 88.....	16
Jennison v. Kirk, 98 U. S., 453.....	20
Louisville & Nash. R. R. v. Finn, 235 U. S., 601.....	17
N. Y. C. & H. R. R. R. Co. v. General Electric Co., 219 N. Y., 227.....	40
Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510.....	39
People ex rel. N. Y. C. R. R. Co. v. Public Ser. Comm., 198 App. Div., 436; affirmed 232 N. Y., 606.....	8, 27, 29, 32
People ex rel. Erie R. R. Co. v. Public Ser. Comm., 176 App. Div., 28; affirmed 220 N. Y., 674.....	35
Railroad Commission v. Southern Pacific Co., 264 U. S., 331.....	39
Standard Oil Co. v. U. S., 221 U. S., 1, 50.....	20
Stoddard v. Manzella, 207 App. Div., 519.....	6
Texas & Pacific Ry. v. Gulf, &c. Ry., 270 U. S., 266.....	40

Statutes

Interstate Commerce Act, sec. 6, subd. 13.....	14
N. Y. Laws of 1911, ch. 746, Sec. 15.....	33-34

BRIEF FOR APPELLEE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 284

THE UNITED STATES OF AMERICA and INTERSTATE COM-
MERCE COMMISSION,

Appellants,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellee.

Appeal under Section 238 (4), Judicial Code, as amended February 13, 1925, from a final decree of the District Court of the United States for the Northern District of New York, dated October 9, 1925. (R. 137-138.) Opinions below: 13 F. (2d.) 200; R. 127.

Appellee, The New York Central Railroad Company, in this brief called the railroad, brought this suit against the United States, under the Urgent Deficiency Appropriations Act of October 22, 1913 (38 Stat. L. 219) and Section 208, Judicial Code (R. 2), to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission, dated December 9, 1924 (R. 15, 53), in this brief termed the Order, made upon the complaint of the State of New York and its Superintendent of Public Works. (R. 17.) The statutory venue (38 Stat. L. 219) was determined

by the official residence of the State Superintendent of Public Works (R. 3; *Stoddard v. Manzella*, 207 App. Div., 519). Under Section 212, Judicial Code, the Interstate Commerce Commission intervened. (R. 49.)

The Order, made upon a "complaint for failure to render service under section 6, subdivision 13, of the Interstate Commerce Act" (R. 16), purports to require the railroad to perform a transportation service between points on its lines and points on the lines of its connections, on the one hand, *and* the Erie Basin Barge Canal Terminal, at Buffalo, N. Y., on the other, and with its locomotives, cars and employees to operate the tracks upon the terminal. (R. 7.)

In its petition to the court below the railroad contended that the Order is null and void, because granted in excess of the authority conferred upon the Commission by subdivision 13 of section 6 of the Interstate Commerce Act, in that:

(a) It is not limited to cases where "property may be or is transported from point to point in the United States by rail and water." (R. 8);

(b) It is supported by no finding by the Commission that property may be or is so transported. (R. 8-9);

(c) It was made in a proceeding wherein the Commission had before it and subject to its jurisdiction no common carrier or carriers by water which might or did engage in such transportation, whereas the statute confers authority upon the Commission to make such an order only when there are before it and subject to its jurisdiction both a common carrier or carriers by rail and a common carrier or carriers by water, which may or do engage in such transportation. (R. 9);

(d) It does not create a through route or routes for the transportation of property by common carriers by rail and water through or via the terminal, since it requires no common carrier by water to participate in any interchange of freight at the terminal, or to accept for through transportation freight which may be delivered at the terminal by the railroad. (R. 10);

(e) It does not prescribe the terms and conditions upon which the tracks connecting the railroad's lines with the dock shall be operated, nor does it determine what sum shall be paid to or by the railroad or any water carrier in the operation of such tracks. (R. 10-11);

(f) It requires the railroad to extend its lines. (R. 11-12);

(g) It requires the railroad to perform a transportation service between the terminal and points upon the lines of other connecting railroads not parties to the proceeding. (R. 12);

(h) It requires the railroad to furnish transportation with respect to intrastate traffic. (R. 12);

Such contentions were put in issue by the answers of the United States (R. 47) and of the Interstate Commerce Commission. (R. 50.)

Upon the application for an interlocutory injunction, the case was submitted, by agreement, for final hearing upon the pleadings and the record of the proceedings before the Interstate Commerce Commission; whereupon decree went for the railroad, pursuant to an opinion by Circuit Judge HUGH in which District Judge KNOX concurred; District Judge COOPER dissenting in an opinion. (R. 127-138.)

Statement of the Case.

At an expense of over \$150,000,000, the Barge Canal was constructed by the State of New York and extends across the State from Albany to Tonawanda with branches from Whitehall to Waterford, from Syracuse to Oswego and from Geneva to Montezuma. (R. 20.) The State of New York does not operate boats upon the canal, but merely provides the waterway, and is, therefore, not a common carrier. (R. 24, 97.)

The State has constructed terminals at various points along the Barge Canal and, among others, the Erie Basin Terminal, situated upon Buffalo Harbor, adjacent to Lake Erie, within the City of Buffalo. (R. 20.) It embraces about eight acres of land and comprises two covered piers, 500 and 400 feet long, respectively,

with electrically operating machinery for loading and unloading vessels. (R. 21.) Rock Street, a public street, forms the eastern boundary of the terminal property and the right-of-way of the railroad adjoins Rock Street on the opposite side. (R. 80.) More than 5,000 feet of standard gauge tracks have been constructed by the State upon the Terminal, including tracks leading to the piers and an extensive layout of storage tracks on the eastern portion of the Terminal away from the piers. (R. 21, 25.) From the tracks of the railroad on its right-of-way there has been constructed a track connection, called the interchange track, joining the tracks of the railroad with the tracks upon the piers. (R. 17, 25, 104, 107.) The distance from this track connection, which is approximately at the boundary of the railroad's right-of-way, to the piers is from 800 to 900 feet, as scaled on Exhibit 5. (R. 61.)

The railroad has consented to place cars containing freight destined to the Erie Basin Terminal upon the interchange track and to receive cars containing freight coming from the Terminal when delivered to it upon this track. (R. 26.) The State of New York, however, has demanded not only that the railroad shall deliver and receive cars at the interchange track, but that it shall transport freight to and from the docks of the Terminal and shall with its locomotives and employees perform all switching operations and other operations in the handling of freight upon the tracks within the Terminal. (R. 19.)

In 1920 the State of New York applied to the Public Service Commission of the State for and obtained an order requiring the railroad to provide a transportation service to and from the Terminal and to perform all railroad operations on the Terminal, but that order was set aside by the State courts upon the ground that Congress, in enacting Section 6, Subdivision 13, of the Interstate Commerce Act, had occupied the field of regulation of the interchange of freight between common carriers by rail and by water, and that therefore the State law was inoperative. *People ex rel. N. Y. C. R. R. Co. v. Public Service Comm.* (198 App. Div., 436; *aff'd*, 232 N. Y., 606). Certiorari to the State Courts was denied in 258 U. S., 631.

Thereupon the State of New York and its Superintendent of Public Works filed with the Interstate Commerce Commission a complaint, invoking the jurisdiction of that Commission under Section 6, Subdivision 13, of the Interstate Commerce Act, and praying for an order of the Commission thereunder, requiring the railroad to furnish a transportation service for the transportation of freight between the Terminal and points on its line and also points on the lines of its connections, and with its locomotives and employees to perform all railroad operations upon the tracks within the Terminal. (R. 17.) To such complaint the railroad filed its answer (R. 75), asserting, among other defenses, that the Commission was without jurisdiction to exercise any authority under Section 6, Subdivision 13, of the Interstate Commerce Act for the reason that no common carrier by water operating upon the canal with whom freight would be interchanged at the Terminal was made a party to the case or was subject to the jurisdiction of the Commission.

Hearings were had before an Examiner of the Interstate Commerce Commission. (R. 54.) At the first hearing the railroad moved to dismiss the complaint, upon the ground that no common carrier by water was before the Commission and that therefore the Commission was without jurisdiction. The motion was overruled. Thereupon the Deputy Attorney-General of the State of New York, representing the State, presented what he called an intervening petition, asking that two alleged common carriers by water, the Inter-Waterways Line, Inc., and the Rochester Terminal and Canal Corporation, be permitted to intervene. The Examiner allowed the intervention and also ruled, over the objection of the railroad, that these water carriers should be treated as complainants. (R. 55, 63-64, 75.)

A copy of the minutes of the testimony taken before the Public Service Commission (R. 79-126) was introduced as evidence in the proceeding before the Examiner (R. 19, 59), and in addition thereto various witnesses were called to give testimony. (R. 54-75.)

The evidence before the Interstate Commerce Commission may be summarized briefly as follows:

1. A description of the New York State Barge Canal and testimony with respect to the amounts expended for its construction. (R. 57-58.)

2. A detailed description together with blueprints and photographs of the Erie Basin Terminal, including the tracks upon the Terminal and the tracks connecting with the tracks of the railroad. (R. 61-62.)

3. Testimony of operating officials of the railroad to the effect that the tracks upon the Terminal were not so constructed as to render operation thereon with modern equipment feasible; that the curves were so severe that a modern switching engine could not go upon the Terminal without danger of derailment, and that the switching of cars upon the Terminal could only be performed with an old fashioned switching engine of short wheel base, and finally that the handling of the cars to and from tracks upon the Terminal would seriously interfere with the operations of the railroad upon its tracks adjacent thereto and particularly the movements of its passenger trains and the passenger trains of other railroads using its tracks. (R. 105, 109-112.)

4. A list (R. 124-126) of the barge lines alleged to be operating upon the canal with, however, no testimony with respect to any of them, except the two which over the railroad's objection were permitted to intervene.

The representative of the Inter-Waterways Line, Inc., one of the so-called intervenors, testified that his company had filed no tariffs either with the Interstate Commerce Commission or with the New York Public Service Commission and that it was free to raise or lower its rates as it wished; that it had never been offered any westbound freight for delivery at Buffalo, except to steamship docks and grain elevators; that its eastbound business consisted largely of shipments of grain from Buffalo which were received directly from elevators, and that it had no present plans for increasing its equipment to handle additional freight. The railroad contends that the testimony of this witness affords no basis for any conclusion that his company will or may interchange freight with the railroad at the Erie Basin Terminal or deliver or receive freight at that point. (R. 71-73.)

The representative of the Rochester Terminal and Canal Company, the other so-called intervenor, testified

that his company is not in the interstate carrying business, that it receives no business either eastbound or westbound through the port of Buffalo, and that it likewise filed no tariffs either with the Interstate Commerce Commission or with the New York Public Service Commission. (R. 74.)

No testimony other than that of these two witnesses was produced with respect to any water carrier operating on the New York State Barge Canal.

5. Testimony of representatives of industries located in Buffalo, apparently called by the State in an attempt to prove a demand on the part of the public for the service which the State sought to have the railroad perform and that there would be freight to be transported via the Erie Basin Terminal. To summarize:

The Traffic Manager of the Donner Steel Company testified that his concern had its own docks from which it shipped via the Barge Canal in full barge loads and that it would use the Erie Basin Terminal only for part barge load shipments. His further testimony that the water lines operating on the canal had refused to accept less than full barge shipments indicates, however, that the Terminal could not be used by his company in connection with such shipments. Freight from the Donner Steel Company's plant would have to move over three railroads in order to reach the Terminal. (R. 89-91.)

The Traffic Manager of Larkin Company, while he expressed a desire for the service, testified that his concern did not ship by the Barge Canal for the reason, among others, that there were not proper boats on the canal to handle the character of freight which his concern shipped and the canal is not equipped with suitable terminal facilities for the handling of this freight at the various towns to which his company's shipments moved. (R. 91-93.)

The Traffic Manager of the Rogers-Brown Iron Company testified that his concern was situated similarly to the Donner Steel Company, having its own docks. (R. 96.)

According to its Traffic Manager, the plant of the National Aniline & Chemical Company is located on Buffalo Creek, and while it has no docking facilities at the present time, it would be possible for it to provide

them. Presumably, therefore, if it has any substantial amount of freight to be moved by the Barge Canal it would be to its interest to construct a dock and the fact that it has not done so indicates that it does not intend to ship its freight in this way. (R. 94.)

The plant of the Corrugated Bar Iron Company, Inc., located at Lackawanna, N. Y., is served by the lines of the South Buffalo Railroad which has a water front connection. The representative of this concern said that if his company could ship by water its New York business would be increased from 10,000 to 20,000 tons a year. (R. 64-65.)

The foregoing witnesses were the only men directly connected with any industries at Buffalo who were called as witnesses below. The State also offered the Traffic Manager of the Buffalo Chamber of Commerce, who estimated that there would be from 100,000 to 125,000 tons of freight to move in and out of Buffalo by the Barge Canal. This statement was based upon replies which the witness said he had received from a circular letter which had been sent out by him. The Examiner ruled that the circular letter was not admissible in evidence, but the witness stated the substance of the letter. The replies which the witness said that he had received were excluded by the Examiner, but the witness expressed an opinion, based upon those replies, that there would be approximately 100,000 to 125,000 tons of freight to be handled through the Erie Basin Barge Canal Terminal if the railroad were required to perform the transportation service sought. The witness admitted that the circular letter had been sent to a great many people, that only 81 replies had been received, that there were a great many from whom no replies were received and that a great many of the replies were adverse, that is, that the parties were not interested in or did not have freight to move via the Erie Basin Terminal. (R. 70-71.)

The railroad contends that the testimony of this last witness was entirely incompetent and that certainly upon the record there is no evidence justifying a finding that any freight or at least any appreciable quantity of freight is or may be transported by rail or water via the Terminal.

Following the hearings the Examiner submitted a proposed report, containing the findings which he recommended, and excep-

tions thereto were filed. (R. 20.) Before the Interstate Commerce Commission, in brief and argument, the railroad urged that the Commission was without jurisdiction to grant the relief prayed for under Section 6, Subdivision 13, of the Interstate Commerce Act, because no common carrier by water was before the Commission and subject to its jurisdiction; and because there was no evidence upon which the Commission would be justified in finding that there was any property which might or would be transported by rail and water via the Terminal. (R. 29.)

In the Commission the prevailing opinion was delivered by Mr. Commissioner McCHORD (R. 20), with whom Mr. Commissioner EASTMAN concurred in a separate opinion (R. 30); while Mr. Chairman HALL dissented in an opinion in which Mr. Commissioner POTTER concurred. (R. 36, 46.)

On December 9th, 1924, the Commission issued its order as follows (R. 7):

"It is ordered, That the above-named defendant provide, on or before May 1, 1925, and thereafter maintain, subject to the usual tariff provisions with respect to the opening and closing of navigation on the canal, a transportation service between the Erie Basin barge-canal public terminal, in the City of Buffalo, State of New York, and points and shippers located on said defendant's line and on lines of its connections, and perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary to an interchange of traffic with barge-canal lines at said terminal, the said services to embrace all traffic, interstate and intrastate, that may be transported to or from said terminal over said defendant's line.

It is further Ordered, That said services shall include the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the terminal and the points and shippers aforesaid, and the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing, and removal of such cars therein and therefrom."

ARGUMENT

I.

Since the Order was made solely under the provisions of Section 6, Subdivision 13, of the Interstate Commerce Act, its validity depends upon whether, in the circumstances, such provisions conferred upon the Commission power to make the Order.

Section 6, Subdivision 13, of the Interstate Commerce Act, as amended by Sections 412 and 413 of Transportation Act, 1920 (41 Stat. L. 483), is as follows:

“(13). When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

“(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under Section 1 of this Act.

" (b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

" (c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

" (d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The complaint filed with the Interstate Commerce Commission by the State of New York and its Superintendent of Public Works, a copy of which is set forth as Exhibit B to the petition of the railroad in the District Court, stated in its title and in its prayer for relief that it was a complaint under Section 6, Subdivision 13, of the Interstate Commerce Act. Throughout the complaint no other portion of the Interstate Commerce Act was invoked. (R. 16-18.)

From the report of the Commission, annexed as Exhibit C to the petition of the railroad in the District Court, it will be seen that the Commission, in determining the proceeding before it and in making its order, purported to do so only under Section 6, Subdivision 13, of the Interstate Commerce Act. (R. 27.)

Hence the validity of the Order turns upon whether, in the circumstances, the issuance of the order was a proper exercise by the Commission of its authority under this portion of the Interstate Commerce Act. In stating the question presented by this case, the brief for the United States (p. 2) relies entirely upon paragraph (13) of Section 6. It is therefore unnecessary to consider whether the Commission, as contended at page 25 of its brief, might have made the Order under some other provision of the statute pursuant to which it did not purport to act and as to which the railroad has had no day in court before the Commission.

I. C. C. v. Louisville & Nash. R. R., 227 U. S., 88, 91.

II.

As Section 6, Subdivision 13, of the Interstate Commerce Act confers jurisdiction upon the Commission only "when property may be or is transported from point to point in the United States by rail and water through the Panama Canal, or otherwise, and not entirely within the limits of a single state," the Order is void because it is predicated upon no finding that property is or may be transported in the manner described and because there is no competent evidence to support such a finding.

So the railroad contended below. (R. 8-9.)

Section 6, Subdivision 13, was a new provision added to the Interstate Commerce Act by the Panama Canal Act of August 24, 1912 (37 Stat. L. 556). By its terms it conferred upon the Commission jurisdiction "in addition to the jurisdiction given by the Act to regulate commerce" and Congress definitely provided that these additional powers should be exercised only in the particular conditions which it therein specified.

The first of these conditions is obviously that described in the first sentence of the subdivision, namely, "when property may be or is transported from point to point in the United States by rail and water * * * the transportation being by a common

carrier or carriers and not entirely within the limits of a single state"; and only with respect to "such transportation."

So, before the Commission may assume in any proceeding to exercise any of the powers specified in Section 6, Subdivision 13, it must find, upon competent evidence before it, that property may be or is transported from point to point in the United States by common carriers by rail and by water.

The report of the Commission describes the location and physical characteristics of the Barge Canal at some length (R. 20); describes the docks and piers and tracks of the Erie Basin Terminal (R. 21); and gives a list of the principal canal carriers operating on the canal. (R. 24.) It also gives the number of tons of freight interchanged between canal carriers and lake carriers and the number of tons of local freight handled by canal into and out of Buffalo. (R. 26.) But it makes no finding in so many words that there is any freight which may be or is transported by rail by the railroad, and by water by some common carrier by water, via the Erie Basin Terminal as an interchange point.

If it be urged that such a finding should be inferred from the language of the report as a whole, the answer is, *first*, that it is in direct conflict with the only references, which are to be found in the Commission's report, as to traffic to be interchanged at the Terminal and, *second*, that it is unsupported by any competent evidence of record and is therefore arbitrary.

Louisville & Nash. R. R. v. Finn, 235 U. S.,
601, 607.

To quote from the only reference in the Commission's report to testimony with respect to freight to be handled via the Erie Basin Terminal (R. 26):

"Traffic officials of five of the principal industries at Buffalo testified in behalf of the complainants. Two of them have their own docks, but desire to make less-than-barge shipments via the Erie Basin Terminal. Of the remainder, two have water connection with the terminal, but have no docks at their plants. The traffic manager of the Buffalo Chamber of Commerce estimates that the volume of traffic that would move over the connection,

if the proposed service were established, would range from 100,000 to 125,000 tons per year. One of the principal shippers estimates that its traffic alone would amount to 20,000 tons annually."

There is nothing in the Commission's report to indicate that it has accepted the statements of these witnesses as conclusive, or that it has made a finding in accordance therewith. Other statements of the traffic officers of the five principal industries, mentioned in the portion of the Commission's report above quoted, have been outlined at pages 10, 11 and 12 of this brief. It should be observed that the testimony of all but one (R. 64) of these men was given only at the hearing before the Public Service Commission in 1920; and that three years later, at the hearing before the Examiner of the Interstate Commerce Commission, after the Barge Canal had been in operation for three years and they had had an opportunity to determine whether or not they would have freight to ship by the canal, not one of them reappeared or was recalled as a witness. Therefore so far as the statements of these witnesses are concerned, if any finding is to be inferred from the language of the Commission's report, such finding must be with respect to a condition existing three years before the Interstate Commerce Commission hearing, and more than four years before the date of the Order.

The last sentence above quoted and mentioned at page 7 of the brief for the United States is erroneous, for an examination of the record will show that what this witness testified was not that his company's traffic by the canal would amount to 20,000 tons annually, but that if it had barge facilities it would increase its New York City business from 10,000 to 20,000 tons. (R. 65.)

The Traffic Manager of the Buffalo Chamber of Commerce was the only other witness mentioned in the above quotation from the Commission's report who was called as a witness at the hearing in 1923 before the Interstate Commerce Commission's Examiner. His testimony is summarized at page 12 of this brief. The mere statement by the Commission that "the Traffic Manager of the Buffalo Chamber of Commerce estimates that the volume of the traffic that would move over the connection if the proposed connection were established would range from 100,000 to 125,000

tons per year" certainly cannot be construed as a finding by the Commission that from 100,000 to 125,000 tons would move via the Terminal, and if so construed it would be likewise arbitrary and not a proper foundation for the Order.

So the Commission has made no finding, and there is no competent evidence to support a finding, of the existence of the first circumstance which is made a requisite to the exercise by the Commission of any authority under Section 6, Subdivision 13, of the Interstate Commerce Act, namely, that freight may be or is transported by a common carrier or carriers by rail *and* water via the Erie Basin Barge Canal Terminal. And this is without regard to whether the boat lines now operating on the canal are common carriers by water engaged in such transportation, within the language of the statute—a question which will be considered under the next point in this brief.

III.

It is essential to the exercise by the Commission of the jurisdiction conferred upon it by Section 6 that there be before it and subject to its jurisdiction both the common carrier or carriers by rail and the common carrier or carriers by water which do or may engage in the transportation by rail and water; and there being no common carrier by water subject to the Commission's jurisdiction in the present proceeding, the Commission was without authority to issue the Order.

So the railroad contended below. (R. 9.)

(A) The plain purpose of subdivision 13 of Section 6 is to promote through transportation by rail *and* water; and the accomplishment of this purpose requires that both a common carrier by rail and a common carrier by water be before the Commission and subject to its jurisdiction.

A reading of Subdivision 13 of Section 6 as a whole discloses an intention on the part of Congress to promote through transportation by rail and water. The powers conferred upon the Commission are appropriate to this end. Such being the purpose of the statute, those powers may be exercised only when, and in

such manner that, they will accomplish that purpose. Little public good could be derived from a requirement that freight be transported to a dock, there to be left where it cannot be protected by the rail carrier, and without any assurance that it will be accepted for further transportation by a water carrier. Thus Congress must have intended that the Commission should exercise its powers only when, by so doing, it could bring about an arrangement for through transportation, and obviously, therefore, only when both the rail carrier and the water carrier should be subject to the Commission's jurisdiction.

The statements of the supporter of a statute in advocating its passage, though not permitted to control its construction, may indicate the intention of Congress in the passage of the act.

Jennison v. Kirk, 98 U. S., 453, 459-460;

Standard Oil Co. v. U. S., 221 U. S., 1, 50.

Senator Jones, a member of the Senate Committee on Inter-oceanic Canals, speaking to the Panama Canal bill in committee of the whole on the day final vote on the bill was taken, said (48 Congressional Record 10578, Aug. 9, 1912):

"There are other provisions in Section 11 (which became the portion of the Interstate Commerce Act here in question) that I think really are of greater importance * * *. One of them provides that the Interstate Commerce Commission may establish *through* connection between rail lines and the docks of the water carrier where it is reasonably practicable to do so * * *.

"Then we also provide that the Interstate Commerce Commission may establish through routes and maximum joint rates over a rail-and-water line and determine the conditions under which such lines shall be operated. In other words we place through rates under the control of the Interstate Commerce Commission and require the rail lines and the water lines to make and furnish connections to and with each other * * *.

"We also empower the Interstate Commerce Commission to establish maximum proportional rates by rail to and from ports to which their traffic is brought or from which it is taken by a water carrier. We empower

the Commission to determine upon what traffic these rates shall be laid and the conditions under which they shall apply."

If such was the purpose of Congress in conferring upon the Commission the powers specified in Subdivision 13 of Section 6, then the Commission may exercise those powers only when both a rail carrier and a water carrier are before it; for it is obvious that the Commission cannot create a through route for the transportation of freight by rail and by water unless it has jurisdiction of both the rail carrier and the water carrier. Neither can it bring about an interchange of freight between a rail carrier and a water carrier unless it has before it both the carrier that is to deliver and the carrier who is to receive the freight, for an interchange is by its very name an act which requires the participation of at least two parties.

Congress could not have expected that the Commission, having jurisdiction over through transportation and acting under a provision designed to promote such through transportation, should require a rail carrier to perform a transportation service, deliver freight to a dock and leave it for transportation by the water carrier entirely without regulation or control.

The Order in no way either creates or promotes the through transportation of freight by rail and water. The railroad is required to transport freight to the Barge Canal Terminal, but the order makes no provision as to what shall be done with the freight after it reaches Terminal. No water carrier is required to receive it and transport it to destination. All that the Order purports to require is a local rail transportation service by the railroad to and from the Terminal, a transportation service which may be entirely apart from and unconnected with any through transportation by water.

Since the purpose of Subdivision 13 of Section 6 must be to promote through transportation by rail and water, and since the presence of a common carrier by water in the proceeding is essential to the accomplishment of this purpose, the absence of any common carrier by water subject to the Commission's jurisdiction in the present case is a vital defect which renders the Order null and void.

(B) The various provisions of Subdivision 13 of Section 6 of the Interstate Commerce Act, by their language, clearly require the presence of a common carrier by water, in order to give the Commission jurisdiction to exercise the powers conferred therein.

Under Point II it has been observed that the introductory paragraph of Subdivision 13 of Section 6 of the Interstate Commerce Act provides that the jurisdiction of the Commission under this portion of the Interstate Commerce Act arises only when property may be or is transported by rail and water from point to point in the United States and when the transportation is by a common carrier or carriers. The sentence in question continues: "The Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same." From this it is plain that the Commission has jurisdiction only when the property is to be transported by common carriers by rail and water, but that when this occurs the Commission is to have jurisdiction of both the common carrier by rail and the common carrier by water. Therefore the presence of a common carrier by water is necessary in any proceeding in which the power of the Commission under this portion of the Interstate Commerce Act is invoked, not only to provide evidence of the necessary condition precedent to the exercise of the Commission's jurisdiction, namely, that property may be or is transported by rail and water, but also to give the Commission the jurisdiction which the Act contemplates over the subject matter, namely, over such transportation and the carriers participating therein.

That the presence of the common carrier or carriers by water with which freight is to be interchanged is necessary to the exercise by the Commission of the power conferred upon it by the provisions of the Act in question is clear, also, from the further portions of Subdivision 13 of Section 6 and the character of the Commission's jurisdiction thereunder.

By paragraph (b) the Commission is given authority "to establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling

of the traffic embraced." Clearly the jurisdiction conferred by this paragraph can be exercised by the Commission only when both a rail carrier and a water carrier are before it.

Paragraph (c) of Subdivision 13 of Section 6 likewise requires the presence before the Commission of a common carrier by water, for while the Commission is given authority to establish proportional rates by rail to and from the ports it is also "to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply." This it cannot do without having evidence as to the water carriers, and it cannot make any binding determination unless the water carriers operating the vessels are before it.

Paragraph (d), referring to arrangements between a rail carrier and a water carrier for transportation to or from a foreign country, is not pertinent to the present inquiry.

The Commission evidently realized the force of the contentions above made with reference to paragraphs (b) and (c), for its report and Order clearly indicate that the Commission did not purport to act under paragraphs (b) and (c), but solely under paragraph (a). (R. 27.) But the fact that the Order purports to be issued under paragraph (a) of Subdivision 13 of Section 6 does not obviate the objection that no common carrier by water was before the Commission and subject to its jurisdiction.

By paragraph (a) it is provided that the Commission shall have jurisdiction to establish physical connection between the line of the rail carrier and a track or tracks to the dock "by directing *either or both the rail and water carrier*, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock." Since alternative methods of accomplishing this result are provided, the Act clearly contemplates a decision as to which of such methods shall be employed, but, in order to decide whether the connection should be constructed by the rail carrier or by the water carrier or by them both jointly, the Commission must have both carriers before it. This is emphasized by the next provision which directs that the Commission "shall have full authority to determine and prescribe the terms and conditions under which these connecting

tracks shall be operated," and by the further clause providing that the "Commission may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by *either carrier*." How can the Commission prescribe the terms and conditions, or determine what sum shall be paid to or by either the rail carrier or the water carrier, unless both carriers are before it? In the present case, as the connection had already been constructed (R. 17, 25, 104, 107), the Commission was not called upon to act under the first provision. The action of the Commission, therefore, can be said to proceed only under the latter provision of paragraph (a) which most clearly requires that a water carrier be a party to the proceeding.

Hence a reading of paragraph (a) alone does not support the Order.

But paragraph (a) is to be read in connection with the entire Subdivision 13 of Section 6 and construed accordingly. As the real purpose of this subdivision is the establishment of through routes over rail and water lines, the establishment of proportional rates by rail and the fixing of the terms and conditions by which traffic shall be handled by water (in other words to provide for through rail and water transportation), the acts mentioned in paragraph (a) are merely acts preliminary to the accomplishment by the Commission of the general purpose of Subdivision 13, and unless the Commission is in a position to carry out the purposes of the entire subdivision it is without any authority under paragraph (a).

That this is so is borne out by the language of paragraphs (b) and (c) of Subdivision 13 of Section 6, which certainly suggests that the Act is to be treated as a whole and that the exercise of the jurisdiction conferred by any of its provisions requires the presence before the Commission of a particular common carrier by water with whom the freight is to be interchanged. Paragraph (b) plainly requires the presence of a water carrier before the Commission, because the Commission is to establish through rates over rail and water carriers. The water lines are described in paragraph (b) as *such* water lines, indicating that they are the water lines mentioned in previous provisions. Again, the juris-

diction conferred by paragraph (c) requires the presence of a water carrier before the Commission, because the Commission is to determine in connection with what vessels the rates shall apply. Here the language used is "*the* water carrier." Use of the word "*the*" indicates both that the reference is to the water carrier mentioned in previous paragraphs of the subdivision, and also that the particular water carrier with which interchange is to be made must be before the Commission. Otherwise Congress would have empowered the Commission to establish proportional rates by rail to and from the dock from and to which traffic is taken by *any* water carrier.

So the entire language of Subdivision 13 of Section 6 requires the conclusion that the Commission is authorized to exercise the powers enumerated therein only when there are before it, and subject to its jurisdiction for the purposes thereof, the common carrier or carriers by water, as well as the common carrier or carriers by rail, who engage or are to engage in the through transportation of freight by rail and by water.

In none of the many rate cases cited at pages 14 and 15 of the brief for the United States, in support of the undeniable proposition that a State, under proper circumstances, may be a complainant before the Interstate Commerce Commission, was there absent a common carrier with which it was sought to establish reciprocal rights and liabilities to maintain an interchange of transportation facilities.

(C) The Interstate Commerce Commission has itself heretofore exercised the powers conferred upon it by Subdivision 13 of Section 6 of the Interstate Commerce Act in cases where both the rail carrier and the water carrier, between which it was sought to have freight interchanged, have been before it.

This is the first instance which we have been able to discover where the Commission has assumed to enter an order against a rail carrier, where the carrier by water, with which the interchange of freight was sought to be required, has not likewise been before the Commission. The proceeding has usually been instituted by the water carrier on a complaint praying that the Com-

mission require the rail carrier to participate in through transportation with the water carrier.

In Re Wharfage Facilities at Pensacola, Fla.,
27 I. C. C., 252;

*Baltimore & Carolina S. S. Co. v. A. C. L. R.
R. Co.* 49 I. C. C., 176;

*Colonial Navigation Co. v. N. Y. N. H. & H.
R. R. Co.*, 50 I. C. C., 625;

In the first of the cases above cited the Commission said (p. 259):

"The Act to regulate commerce, especially as amended by the provisions of the Panama Canal Act above quoted, brings the regulation of these facilities within the jurisdiction of the Commission, and imposes upon it the duty of determining what vessels should use these facilities and the terms and conditions of such use."

What clearer indication could there be that the Commission construed the Act as requiring the water carriers to be before it? How otherwise would it be possible to determine what vessels should use the facilities in question, namely, the docks at which interchange was to be made?

Pertinent is the Commission's decision in *Charleston & Norfolk S. S. Co. v. C. & O. Ry Co.*, 40 I. C. C., 382. The complaint there was filed by a corporation which claimed to be organized to operate as a common carrier by water, and which sought an order of the Commission, under paragraph (c) of Subdivision 13 of Section 6, requiring the rail carrier to establish proportional rates, to and from an interchange point with the boat line, on traffic to be handled in connection with the boat line and other boat lines which might be operated between the points named. The Commission declined to make the order, holding that it was without jurisdiction for the reason that the complainant owned no vessels and was not yet equipped as a common carrier to interchange freight with the railroad.

(D) No common carrier by water was properly before the Interstate Commerce Commission in this proceeding and subject to its jurisdiction.

The only parties to this proceeding before the Commission, at its beginning, were the State of New York, the Superintendent of Public Works of the State of New York, and the railroad. While the State of New York constructed and owns the Barge Canal and the Erie Basin Terminal, it is not a common carrier by water. (R. 97; *People ex rel. N. Y. C. R. R. Co. v. Pub. Serv. Comm.*, 198 App. Div., 436, 438.) There is no evidence and no contention is made that the Superintendent of Public Works operates vessels on the Barge Canal as a common carrier. The same is true of the railroad. At the outset of the case before the Commission the railroad insisted that there was a complete absence of any common carrier by water as a party to the proceeding. (R. 50, 55, 76.)

The only attempt to remedy this situation was the filing by the Deputy Attorney-General of the State, at the first hearing before an Examiner of the Interstate Commerce Commission, of a petition of intervention on behalf of two corporations alleged to operate boats upon the canal. The Examiner allowed the intervention and also ruled that these boat lines might be made parties complainant. (R. 55-56, 63.)

The railroad urged, in opposition to the intervention, that, since previously there was no common carrier by water before the Commission, there was no cause of action alleged under Subdivision 13 of Section 6 of the Interstate Commerce Act and therefore there was no pending proceeding in which the intervention might be permitted; also, that new issues would be presented, which the railroad should have an opportunity to meet. (R. 55-56, 63.)

However, assuming that, after some fashion, these two alleged water carriers became parties to the proceeding before the Commission, although they have not felt sufficiently concerned to exercise their right under Section 212, Judicial Code, to intervene in this suit (*Chicago Junction Case*, 264 U. S., 258, 267), it does not follow that this cured the defect in the cause of action.

There is no indication that these two water lines submitted themselves in any way to the Commission's jurisdiction. At most, they intervened to express their interest in the outcome, but with no intention that the Commission should deal at all with them in respect to the interchange of freight or fixing the terms and conditions of such interchange. Certainly it was not with any intention that the Interstate Commerce Commission should take steps toward the establishment of arrangements for through transportation over their lines, for the Deputy Attorney General of New York, who appeared also as their counsel (R. 74), said (R. 64):

"Through routes and joint rates are not asked for at this time."

The representative of one of these companies, called as a witness on behalf of the complainant, stated that he did not even know the status of his company in this proceeding. (R. 71.)

If these two companies be treated as complainants and their petition for intervention be regarded as a complaint, then it will be observed that it prays for no relief with respect to them. Paragraph 2 of their petition states (R. 78) "that it is essential to their business that they should be able to interchange traffic with the defendant," but in their prayer they ask only for leave to intervene and participate; they do not pray that the railroad be required to interchange freight with them or that the Commission fix the terms and conditions of such interchange. Whatever be their status upon the pleadings, there is no evidence of record with respect to their financial condition or their ability to participate in the interchange operations; nor is there any evidence upon which, even with respect to these two alleged water carriers, the Commission would be justified in fixing the terms and conditions under which the Erie Basin Terminal should be operated or freight interchanged or transported by rail and water.

Finally, the presence of these two water lines, in whatever capacity in this case, in no way affects the situation, since they are not, and do not seek to become, "common carriers by water" subject to the Commission's jurisdiction under the provisions of the

Interstate Commerce Act. Their boats or barges appear to be of that "tramp" class mentioned in the concurring opinion of Mr. Commissioner Eastman (R. 33) and in the dissenting opinion written by Presiding Justice Kellogg when this matter was before the New York courts (198 App. Div., 436, 444).

This is the view urged by Mr. Chairman Hall in his dissenting opinion (R. 43), in which Mr. Commissioner Potter concurred. Mr. Chairman Hall develops his theory to the point that the Commission's jurisdiction under Section 6, Subdivision 13, exists only when there are before it both a rail carrier and a common carrier by water subject to the provisions of the Interstate Commerce Act within the definition contained in Section 1 of that Act. (R. 44.)

From the standpoint of proper statutory construction this position is sound. Subdivision 13 of Section 6 was added as an amendment to the Interstate Commerce Act by Section 11 of the Panama Canal Act (37 Stat. L. 568), approved August 24, 1912. With this subdivision thus already included in the Act, Section 1 of the Interstate Commerce Act was re-enacted by Section 400 of Transportation Act, 1920, in somewhat revised form (41 Stat. L. 474). So that the first two paragraphs of Section 1 read as follows:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment."

Paragraph 3 of Section 1, as likewise re-enacted, contains this clause:

"Whenever the word 'carrier' is used in this Act it shall be held to mean 'common carrier.'"

The introductory paragraph of Subdivision 13 provides that the Commission's jurisdiction of the transportation therein described "and of the carriers, both by rail and by water," which

engage in the same, shall be "in addition to the jurisdiction given by the Act to regulate commerce." If this jurisdiction is to be *in addition* to the jurisdiction which the Commission already had over the common carriers named, then the Commission must before have had some jurisdiction of such common carriers. The only carriers by water over which the Commission previously had jurisdiction were those which were engaged in rail and water transportation "under a common control, management or arrangement for a continuous carriage." It is therefore only as to such carriers that the power now given to the Commission by Subdivision 13 can be exercised.

In his concurring opinion Mr. Commissioner Eastman takes issue with the views of Mr. Chairman Hall, upon the ground that, if the provisions of Subdivision 13 of Section 6 are so construed, the purpose of these provisions will be nullified, since under such construction the Commission will have jurisdiction only when there is already an arrangement for a continuous carriage by rail and water or when both carriers are under common management or control, and under these circumstances there will probably be no necessity for invoking the Commission's jurisdiction to require the carriers to provide interchange facilities. (R. 31-32.) The argument is fully met in the dissenting opinion of Chairman Hall. (R. 39-42.)

IV.

The Order far transcends the jurisdiction conferred upon the Commission by Subdivision 13 of Section 6, which is only with respect to the transportation of property by common carriers by rail and water between points in the United States and not within the limits of a single state. Hence it is null and void.

So the railroad contended below (R. 12):

Under our Point II it is urged that, in view of the language of the introductory paragraph of Subdivision 13 of Section 6, the jurisdiction of the Commission to exercise the powers therein granted to it arises only when property is or may be transported

from point to point in the United States by common carriers by rail and water. This same introductory paragraph provides that the jurisdiction which is conferred upon the Commission by Subdivision 13 is "jurisdiction of *such* transportation * * * in the following particulars." Paragraphs a, b, c and d, describe the particulars of the jurisdiction, but these particulars exist only with respect to the transportation described in the introductory paragraph. The Order, however, purports to be an exercise of power with respect to transportation other than that which comes within the terms of the introductory paragraph.

(A) The Order is not limited to transportation from point to point by common carriers by rail and water within the provisions of the Interstate Commerce Act.

It relates to transportation by rail only to or from the Terminal, and by its terms the railroad is required to perform the transportation service with respect to all traffic "that may be transported to or from said Terminal over said defendant's line." (R. 54.) This may well include freight to be delivered to the Terminal for some purpose other than transportation thence by water, or freight which has arrived there in some manner other than by water carrier.

(B) The Order is not limited to transportation of freight from point to point in the United States.

It purports to require the railroad to perform the transportation service described therein with respect to all traffic that may be transported to or from the Erie Basin Terminal. This may include freight which has arrived at the Terminal by water from Canada, or which is destined to a point in Canada. Subdivision 13 of Section 6 clearly gives the Commission no jurisdiction to require such transportation.

(C) The Order is not limited to transportation of freight "not entirely within the limits of a single state."

In its comments upon the clause numbered 3 on page 28 of its brief, the United States refrains from discussion of the phrase last quoted.

Although Subdivision 13 of Section 6 expressly states that the jurisdiction conferred is with respect to transportation "not within the limits of a single state," the Order (R. 54) directs that the transportation service therein required shall embrace "all traffic interstate and *intrastate*," a provision which the Government essays to defend in Point V (page 43) of its brief. The reason for this is doubtless to be found in the decision of the New York courts in *People ex rel. New York Central Railroad Company v. Public Service Commission* (198 App. Div., 436; *aff'd* 232 N. Y., 436), wherein it was held that the State Commission was without authority to order the railroad to perform a transportation service to and from and upon the Erie Basin Terminal, basing the decision upon the ground that the Federal government, by the enactment of Subdivision 13 of Section 6 of the Interstate Commerce Act, had occupied the entire field of regulation of interchange facilities for the interchange of freight between rail and water carriers.

(D) The Order requires the railroad to perform transportation service between the Erie Basin Terminal and points and shippers located on the lines of the railroad's connections.

It is difficult to see how the railroad can be required to perform a transportation service between the Erie Basin Terminal and points on the lines of its connections. Certainly such transportation service cannot be required under the Act, without the presence in the proceeding of those connections. Yet the Order purports to require such transportation. Indeed, the second paragraph of the Order defines the transportation service which the Order requires as including "the furnishing, by said defendant, of all railroad cars necessary for the transportation of said traffic between the Terminal and the points and shippers aforesaid." (R. 54.)

V.

The Order cannot be sustained as a determination and prescription of the terms and conditions upon which connecting tracks shall be operated, for in substance it requires the railroad to extend its line.

So the railroad contended below. (R. 10-12.)

The Order purports to require the railroad not only to perform a transportation service between points on its line and the track connecting with the tracks upon the Erie Basin Terminal, but to "perform upon the standard-gauge railroad tracks within said terminal and connected with said defendant's tracks the operating service necessary," etc.; and the service is defined as including "the operation, by said defendant, with its own motive power and servants, upon the said railroad tracks within said terminal, of all such railroad cars, loaded and empty, going to or coming from said terminal, including the spotting, placing and removal of such cars therein and therefrom." (R. 54.)

Apparently the Commission assumed to act under that portion of paragraph (a) of Subdivision 13 of Section 6 which authorizes the Commission to prescribe the terms and conditions of operation of a connecting track. In its report (R. near bottom of each of pages 28 and 29) the Commission declared that the relief sought was limited to a transportation service and an operating service.

(A) The Order does not direct or prescribe the terms and conditions of operation.

An order merely directing the railroad to operate the tracks is in no sense an order determining and prescribing the conditions of such operation. The Commission has not determined the terms and conditions of operation as between the railroad and a water carrier. That it could not do because no water carrier is party to the proceeding. Nor does the Order in any way prescribe the terms and conditions under which the railroad shall operate the tracks. Under the circumstances this is an important omission. The tracks are located entirely upon the property of the State of New York. By Chapter

746 of the Laws of 1911 of the State of New York it is provided that the Barge Canal Terminals shall include all tracks upon the terminals, and that the terminals shall be operated and forever remain under the management and control of the State. By Section 15 of that statute the Canal Board is authorized and directed to prescribe rules and regulations for the use of the terminals, but it is provided further that "any use or occupancy of the tracks of any terminal by any railroad car in excess of the time actually necessary to load, unload or immediately reload any such car, or any use or occupancy of the terminal by goods, merchandise or freight, or by vehicles bringing freight to or taking freight from any terminal in excess of that actually necessary to the receipt, shipment or transfer thereof, shall be deemed a misuse of such terminal, and any such car, goods, merchandise, freight or vehicles may be summarily removed from the terminal by the Superintendent of Public Works, or by any officer, agent or employe acting under him, and no claim for damages shall be enforceable against the State of New York." (R. 13.)

The Order requires the railroad to enter upon the terminal with its cars and locomotives, subject to the risk of liability for violating the State law above quoted. No provision is made by the Order for the unloading of the cars after they are placed upon the Terminal by the railroad, or for the disposition of the freight contained therein. Yet, under the State law, the railroad's cars and the freight which the railroad has transported to the Terminal are liable to be removed summarily by the State, to the possible damage of the railroad without any redress against the State.

If the railroad, in operating these tracks, is to have as protection against an alleged violation of the State law the defense that such operation is pursuant to an order of Federal authority, such order should definitely specify the terms and conditions of operation, in order thus to supersede the requirements of the State law.

Because the tracks and the entire terminal facilities are the property of the State, there should be a determination of the rights and duties of the railroad and of the State with respect thereto, and all terms affecting the use of the tracks should be fixed before the railroad is required to enter thereon.

The very facts that the tracks are not upon the railroad's property, that the railroad has no control over the condition of such tracks, and that it has no means of protecting its cars and the freight transported by it from possible injury from other activities conducted upon the Terminal, make it essential, if operation is to be required, that the conditions of such operation be thoroughly specified, and emphasize the degree to which the Order fails to constitute a prescription of any terms and conditions of operation.

Significant is a decision of the New York courts in *People ex rel. Erie Railroad Co. v. Public Service Comm.*, 176 App. Div., 28; affirmed in 220 N. Y., 674, on opinion below.

A track extended from the line of the Erie Railroad to a plant one-quarter of a mile from its station, the track being 479 feet in length from the switch connection. The railroad company had formerly operated the switch connection and track, but it refused to continue to do so unless the owner of the plant would execute an agreement fixing the terms and conditions of operation and the responsibilities of the parties with respect to damage to property, persons, etc. The Public Service Commission found these proposed contract provisions unreasonable and ordered the railroad to tender another agreement with modified provisions and in the meantime to continue to operate the track. This order was brought to the Appellate Division for review on writ of certiorari. The court held the order invalid, saying (p. 31):

"A railroad company cannot control the property of the shipper and if it operates a railroad on the property of the latter it is powerless to take such precautionary measures or establish such rules and regulations as it may think advisable to minimize the possibility of accident and lessen its liability therefor. This side track in question being on the property of the machine and knife works is not within the control of the railroad company, and accidents and liabilities may arise which could be obviated if the railroad company had the sole control and possession thereof."

(B) The tracks upon which the railroad is directed by the Order to operate not being "connecting tracks," within the meaning of Subdivision 13 of Section 6 of the Interstate Commerce Act, the operation ordered by the Commission amounts in effect to an extension of the railroad's line, which the Commission by this section of the Act is not authorized to require.

Even if the Order could be construed as a prescription of the terms and conditions of operation of the tracks therein described, nevertheless the order cannot be sustained as an exercise of authority under Paragraph (a) of Subdivision 13 of Section 6, since these tracks are not tracks with respect to which Paragraph (a) authorizes the Commission to prescribe the terms and conditions of operation.

The statute provides that the Commission shall have authority to determine and prescribe the terms and conditions "upon which *these connecting tracks* shall be operated." Whether the Order can be sustained as an exercise of this authority depends upon the meaning of the words "these connecting tracks," and whether that meaning embraces the tracks described in the Order.

Assuming for the moment that the tracks which the railroad is directed to operate may be considered as connecting tracks, within the meaning of paragraph (a) of Subdivision 13 of Section 6, *the first reason* why the Order cannot be defended as an exercise of the authority conferred upon the Commission by that paragraph is, that the tracks over which operation is ordered are not tracks which have been constructed subject to an order of the Interstate Commerce Commission or subject to its approval. The first sentence of Paragraph (a) authorizes the Commission to require the construction of certain tracks. The second sentence, pursuant to which presumably the Order was made, authorizes the Commission to prescribe the terms and conditions of operation of "*these connecting tracks*." Obviously, this means the tracks which the Commission has ordered to be constructed. The reason for this restriction of the Commission's authority is a substantial one. The proviso to Paragraph (a) limits the track construction which the Commission may require by providing that this construction

"shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under Section 1 of this Act." This proviso is not copied at page 26 of the brief for the United States, its omission being represented by * * * at the end of clause (c); nor is it copied at the end of the sixth line on page 31 of that brief. By Section 1 it is provided that the Commission must find that present or future public convenience or necessity requires or will require the construction or operation or construction and operation (Sec. 1, Par. [18]), and that the expense involved will not impair the ability of the carrier to perform its duty to the public (Par. 21.) Thus by limiting the power of the Commission to deal with the operation of tracks to tracks the construction of which the Commission has required or approved, and by making the requirement of such construction subject to the restrictions as to findings of public convenience and necessity and reasonable expense, Congress has, in effect, safeguarded the public and the railroads from any danger that a railroad may be required to operate tracks where such operation or construction is not in the public interest.

The tracks which the Order requires the railroad to operate were not constructed pursuant to an order of the Commission. They were constructed by the State of New York and were already in existence at the time the Order was made. So they are not tracks with the operation of which the Commission is authorized to deal under Paragraph (a) of Subdivision 13 of Section 6.

The second reason why the tracks described in the Order do not come within the terms of the statute is that they are not "connecting tracks," as that term is there used, or as it should be construed.

Paragraph (a) authorizes the Commission "to establish physical connection between the lines of the rail carrier and the dock * * * by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way." The Commission is also authorized to direct the rail and the water carrier "to construct and connect with the lines of the rail carrier

a track or tracks to the dock." The connection with the track of the rail carrier is that portion of the track which is necessary to join whatever tracks there may be upon the dock with the line of the rail carrier. It is this connection with respect to which the Commission is empowered to prescribe the terms and conditions of operation. Plainly this is a reasonable construction, since it is at the connection alone that the interests of the rail carrier and the water carrier are apt to interfere, assuming that the tracks on the dock are operated by the water carrier as is normally the case.

The Order requires the railroad to operate much more than the connecting track, since it requires it to operate *all* the tracks within the Terminal. The Order, in requiring the railroad to operate not only the connection between its line and the track or tracks to the dock, but the tracks within the Terminal, in effect is not a determination of the conditions of operation of a "connecting track," but constitutes a requirement that the railroad make an extension of its line. The railroad's line does not extend beyond its right of way and the railroad's public undertaking, as defined in its tariff, does not include the transportation of freight from the right of way to a point within the Erie Basin Terminal, much less the switching and other operations necessary to the movement of freight between points within the Terminal. To require the railroad to operate upon tracks which it does not own, and over which it has no control, is to require it to make an extension of its line beyond its present undertaking.

The use of the words "these connecting tracks" in Subdivision 13 of Section 6 and the difference between the meaning of this term and an extension of a line of railroad are emphasized by the fact that under Transportation Act, 1920, a sharp distinction is made between a connecting track and an extension. The term "extension" is used in Section 1 of the Act, and whatever power the Commission has with respect to extensions is derived from the provisions of that section which was not invoked for the purposes of the Order. That the power to regulate *extensions* of railroads is an extraordinary power is emphasized by the fact that paragraph (21) of Section 1 clearly provides that the Commission must make certain very definite findings of public convenience and

necessity, and that it must also find that the construction or operation of the extension will not place such a burden upon the railroad as will interfere with the proper performance of its common carrier undertaking with respect to other traffic. No such issue was before the Commission, whose answer (R. 47) states that its report fully sets forth the issues which it determined.

The distinction between connecting tracks and extensions was clearly pointed out by *Railroad Comm. v. Southern Pacific Co.*, 264 U. S., 331, where this Court, holding that whether or not a particular track is an extension of a carrier's line of railroad is not to be determined by the length of that track, said (pp. 346-347):

"The extensions of the lines and main tracks of these railways under the plan which the State Commission has ordered are not great in distance, but they involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers. Great expense attends such changes of the main tracks in a crowded city, and they here carry with them, as necessarily incident thereto, the abandonment of available sites and of valuable existing passenger and freight stations and the construction of a new union station elsewhere, imposing on the three railways a cost in making the changes of from twenty-five millions to forty-five millions of dollars. We think it clear that in such an extension of main lines with their terminals the Interstate Commerce Commission is required by the act to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public."

The distinction had also been stated in *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S., 510, where it was said (p. 528):

"6. Since the decision in *Wisconsin, etc., R. R. v. Jacobson*, 179 U. S. 287 (invoked at p. 24 of the Commission's brief herein), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other."

In March last this Court declared:

“ If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction.”

Texas & Pac. Ry. v. Gulf, &c. Ry., 270 U. S.,
266, 278.

The railroad has never undertaken to perform a transportation service within the Erie Basin Terminal, the tracks within which are the property of the State. To require it now to operate those tracks is, therefore, to compel it to go outside of its common carrier's undertaking, to extend its line of railroad and to use its facilities for purposes beyond its public profession. The decision of the Court of Appeals of New York in *N. Y. C. & H. R. R. R. Co. v. General Electric Co.*, 219 N. Y., 227 (certiorari denied in 243 U. S., 636), sustains this proposition, that while the railroad has undertaken to transport freight to and from Buffalo, which transportation involves making delivery to consignees and receiving freight from shippers at Buffalo, the duty to deliver and to receive involves no more than the delivery or the receipt of cars on the interchange track connecting with its line, and does not involve an undertaking or a duty to *spot cars* within the Terminal or to switch from one point to another within the Terminal. So the Court of Appeals decided, holding that a carrier had performed its duty in making delivery to an industry when it placed cars upon the interchange track, and that it could not be required to do the switching upon the tracks within the industry's enclosure.

CONCLUSION.

For the reasons set forth in this brief, in the petition to the District Court, in the opinion of JUDGE HOUGH (quoted at length at pages 38-42 of the brief for the United States), and in the dissenting opinion of Chairman HALL, the Commission exceeded the authority conferred upon it by Subdivision 13 of Section 6 of the Interstate Commerce Act, pursuant to which alone the Order was made; the Order is null and void; and its enforcement was properly enjoined by the District Court, whose decree should be affirmed.

Dated New York, N. Y., October 25, 1926.

Respectfully submitted,

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Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 284.—OCTOBER TERM, 1926.

The United States of America and Interstate Commerce Commission, Appellants,	}	Appeal from the District Court of the United States for the Northern District of New York.
vs. The New York Central Railroad Com- pany.		

[November 22, 1926.]

Mr. Justice STONE delivered the opinion of the Court.

The State of New York, by its Superintendent of Public Works, in a complaint filed with the Interstate Commerce Commission, sought to compel the New York Central Railroad Company to provide transportation service between the public terminal of the Erie Barge Canal at Buffalo and shippers located along its tracks and along the lines of other railroads with which it can interchange traffic. The service demanded included the furnishing of rolling stock, motive power, and the placing and removal of cars on the tracks within the terminal, incident to moving traffic between the terminal and appellee's lines. The jurisdiction of the commission was invoked under § 6, par. 13, of the Interstate Commerce Act as amended by the Panama Canal Act; August 24, 1912, c. 390, 37 Stat. 568, and §§ 412, 413, Transportation Act; February 28, 1920, c. 91, 41 Stat. 483.¹

A similar application had been made to the Public Service Commission of New York (Second District). The order of the commission granting this relief was vacated by the state Supreme Court

¹"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in

on the ground that the traffic concerned was interstate in character, jurisdiction over which under the statutes already cited was in the Interstate Commerce Commission. *People ex rel. New York Central R. R. v. Public Service Commission*, 198 App. Div. 436; affirmed without opinion, 232 N. Y. 606.

In the proceedings before the Interstate Commerce Commission, two barge carriers, neither of which had filed rates with it or the Public Service Commission of New York, intervened and were made parties on their petitions setting forth that the interchange of traffic sought to be established by complainant was essential to their business.

After a full hearing the commission granted the relief sought. *State of New York v. New York Central R. R.*, 95 I. C. C. 119. The railroad company then filed a bill in equity in the District Court for northern New York to enjoin the enforcement of the

addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. . . ."

The Panama Canal Act also provides:

"The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing."

commission's order. The case was heard on the record of the Interstate Commerce Commission proceedings by the District Court, three judges sitting, Urgent Deficiencies Act; October 22, 1913, c. 32, 38 Stat. 220; *Lambert Co. v. Balt. & Ohio R. R.*, 258 U. S. 377; which granted the injunction. 13 Fed. (2d) 200. The case comes here by direct appeal. Urgent Deficiencies Act, *supra*.

The State of New York built, owns and controls the Erie Barge Canal and terminals, wharves and docks used in connection with it, including the Erie Basin terminal at Buffalo. The canal extends eastwardly from Buffalo by a circuitous route to the Hudson River and has several branches. The State does not own barges or rolling stock; nor does it transport merchandise or operate the canal, but it maintains this waterway with its facilities open to free public use. About 75 per cent. of the traffic passing over it is interstate.

The Erie Basin terminal, having an area of 9.25 acres, is located on the harbor of Buffalo, adjacent to the right-of-way of the railroad company. It includes two concrete piers with equipment for loading and unloading freight, and five thousand feet of railway track, with sidings, switches and storage tracks. There is a physical connection by switching tracks between the terminal and appellee's lines, which was made in 1919 under a contract between the Director General of Railroads and the State of New York. The New York Central's main road between Buffalo and New York City parallels the barge canal and serves important points reached by it or its connections. The effect of appellee's refusal to perform the transportation service ordered by the Commission is to preclude the interchange of traffic between rail carriers and barge canal carriers at Buffalo, and incidentally to avoid the diversion to the canal of a substantial amount of traffic now passing over the lines of the railroad company to and from industries located along its right-of-way.

In granting the injunction, the district court disregarded the intervention of the two canal carriers on the ground that they were not shown to be engaged in interstate commerce. Section 6, par. 13, of the amended Interstate Commerce Act insofar as it confers authority on the commission to order the operation of the connecting tracks and to determine the sum to be "paid to or by either carrier" was construed to require the presence of two carriers before the commission subject to its jurisdiction. It therefore held that the commission was without juris-

diction to grant the relief sought because there were not two carriers before it, and further, that the complainant, a sovereign State, as owner of the terminal but not a carrier, was beyond its regulatory powers, and presumably could not invoke its jurisdiction.

We lay to one side the question whether the intervenors within the meaning of these Acts are carriers of property which "may be or is transported from point to point in the United States . . . not entirely within the limits of a single state." Nor need we consider to what extent, if at all, the State of New York in the event of its failure to maintain its tracks or facilities is beyond the regulatory or coercive power of the commission as asserted below. Cf. *Georgia v. Chattanooga*, 264 U. S. 472; *Bank of United States v. Planters' Bank*, 9 Wheat. 904, 907.

The jurisdiction of the commission in this case was properly invoked. A state, when its interests are concerned, as well as a private individual, whether carrier or not, may file a complaint with the commission. Interstate Commerce Act, § 13, as amended June 18, 1910, c. 309, 36 Stat. 550. Moreover a complaint is not a prerequisite to the exercise of jurisdiction by the commission. It may of its own motion investigate and act upon any matter which may be the subject of complaint (with exceptions not now relevant), § 13, par. 2, Interstate Commerce Act, as amended; Panama Canal Act, *supra*, at p. 568. Hence the only question that need be considered here is the power of the commission, assuming there was but one carrier before it, to issue the order now attacked.

The Panama Canal Act is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of § 1, par. 9 of the earlier acts, c. 3591, 34 Stat. 585, 586; c. 309, 36 Stat. 547, for furnishing switching and car service to lateral branch railroads and private sidetracks. By § 6, par. 13, so far as pertinent to the present inquiry, the commission is given authority to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and to determine and prescribe the terms and conditions upon which the connecting tracks should be operated. It "may either in the construction or the operation of such tracks determine what sums shall be paid to or by either carrier."

We may assume without deciding that the commission may not determine the amount to be paid to or by either carrier concerned

without having both before it. But the commission is not required by the terms of the statute to make such a determination and here it did not do so. A determination with respect to construction costs was not necessary since the physical connection had already been established. There could be no need for directing a contribution of operating expenses since the rail carrier was ordered to furnish the entire car service. It was free to establish such rates as it deemed reasonable, subject to review by the commission if necessary. The only parties concerned in the order actually made were those before the commission: appellee, which was required to furnish the service, and the State of New York, whose terminal facilities were thus to be used. To have required the presence of one or more canal carriers before the commission for the purpose of making this order would have been an idle ceremony. The construction of the Act contended for is unwarranted by its language and incompatible with its purpose to create an administrative body with authority to facilitate the interchange of interstate traffic between rail and water carriers, by a less formal procedure than prevails in courts of law. We conclude that the commission had authority to make the order and that its findings were supported by the evidence.

We have fully considered other objections to the order but only one is of sufficient moment to require mention. It is argued that the jurisdiction conferred by § 6, par. 13, is limited to interstate transportation while the order directs transportation of both interstate and intrastate traffic. By the terms of this section, the commission is given jurisdiction both of the transportation described and of the carriers, rail and water, engaged in such transportation. By definition, transportation includes " . . . all instrumentalities and facilities of shipment or carriage, irrespective of ownership . . . and all services in connection with the receipt, delivery, . . . and transfer in transit, . . . and handling of property transported," § 1, par. 3, Transportation Act, *supra*, at pp. 474-475.

The commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segre-

gating the freight passing through the terminal, we think it clear that Congress in employing such broad language as "the commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated" intended to confer upon the commission power to regulate the entire stream of commerce. Where as here interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. *People ex rel. New York Central R. R. v. Public Service Commission, supra.* Cf. *State of Colorado v. United States*, 271 U. S. 153; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 485; *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266. An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce would make compliance with the commission's orders impossible and defeat the purpose of the Act.

Judgment reversed.

Mr. Justice SUTHERLAND took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court. U. S.